Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY W. OMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in a federal prosecution, the omission of an element of the offense both from the indictment and from the petit jury's instructions can constitute harmless error.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-4a) is reported at 395 F.3d 1087. The order of the court of appeals denying rehearing en banc (App., *infra*, 5a-6a) and an opinion dissenting from the denial of rehearing en banc (App., *infra*, 6a-22a) are reported at 429 F.3d 835.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2005. A petition for rehearing was denied on October 31, 2005 (App., *infra*, 5a-6a). On January 20,

2006, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *.

STATEMENT

Following a jury trial in the United States District Court for the District of Montana, respondent was convicted of knowingly executing, or attempting to execute, a scheme to defraud a bank, in violation of 18 U.S.C. 1344(1). He was sentenced to five months of imprisonment, to be followed by five years of supervised release. 5 C.A. E.R., Exh. 3, at 1-8. The court of appeals reversed. App., *infra*, 1a-4a.

1. In June 2001, respondent and his girlfriend, Regan Tabor, engaged in a check-kiting scheme. They would write a check on an account at one bank, even though that check was not supported by sufficient funds; deposit the check into an account at a second bank; and then repeat the process using a check on the account at the second bank. Through this scheme, respondent and Tabor obtained large amounts of cash from four different banks in Washington and Montana. The total loss to those banks was estimated at more than $250,000. Gov't C.A. Br. 2-18.

2. On March 5, 2003, a grand jury in the District of Montana indicted respondent on one count of knowingly

executing, or attempting to execute, a scheme to defraud a bank, in violation of 18 U.S.C. 1344(1). Although the indictment alleged the check-kiting scheme in some detail, it did not specifically allege that the scheme itself (or any statement made in the course of the scheme) was materially false or deceptive, or that the banks were federally insured. C.A. Supp. E.R., Tab B at 2.

3. Before trial, respondent moved to dismiss the indictment, contending, *inter alia*, that "the grand jury failed to find probable cause with respect to two essential elements of the offense of bank fraud: (1) that the alleged scheme or schemes were material to defrauding the institution; and (2) that the institutions alleged to be victims were federally insured." Defense's Pre-Trial Mots. 12. The district court denied the motion. C.A. Supp. E.R., Tab C at 4-5. The court first determined that "use of the term 'financial institution' [in the indictment] necessarily implies federally insured status." *Id.* at 5. The court then concluded that the indictment was otherwise valid because it "sets forth the specific facts constituting the offense and tracks the language of § 1344(1)." *Ibid.* The court noted that "[t]here is no indication that [respondent] has been misled" and added that "there is sufficient information to allow [respondent] to prepare a defense." *Ibid.*

At trial, respondent moved for acquittal on the ground that the government had failed to present any evidence that he had made a false or misleading statement (much less a material one). 2 C.A. E.R. 421-427. The district court denied the motion. 3 C.A. E.R. 589. At the close of the evidence, the court instructed the jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that the defrauded financial institutions were federally insured. *Id.* at 627-628.

The court refused, however, specifically to instruct the jury that the government was required to prove that respondent had made a materially false statement. *Id.* at 601. The jury returned a guilty verdict. *Id.* at 674. Respondent was sentenced to five months of imprisonment, to be followed by five years of supervised release. 5 C.A. E.R., Exh. 3, at 1-8.

4. The court of appeals reversed. App., *infra*, 1a-4a. The court noted that "[respondent's] indictment fails to recite an essential element of the charged offense—materiality of falsehood." *Id.* at 2a. Citing its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), the court held that, because respondent's indictment omitted an element of the offense and because respondent properly challenged the sufficiency of the indictment before trial, the indictment should have been dismissed (and respondent was therefore entitled to automatic reversal). App., *infra*, 2a.[1]

5. The government filed a petition for rehearing en banc in which it sought reconsideration of the rule originally adopted by the Ninth Circuit in *Du Bo*, *supra*, that the omission of an element of the offense from a federal indictment constituted structural error necessitating automatic reversal. The Ninth Circuit denied the petition. App., *infra*, 5a-6a.

Judge Graber, joined by Judges Kozinski, O'Scannlain, Bybee, Callahan, and Bea, dissented from the denial of rehearing en banc. App., *infra*, 6a-22a. She reasoned that the "[a]bsolute rule" of *Du Bo* "makes no sense" and that the court "should take this opportu-

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[1] The court of appeals did agree with the government that the indictment was required to allege only "the materiality of the scheme or artifice," not "the materiality of a specific statement." App., *infra*, 3a.

nity to reconsider [it]." *Id.* at 6a. Judge Graber first contended that, to the extent that the rule of *Du Bo* rested on the premise that the omission of an essential element from an indictment was of jurisdictional significance, that premise was "directly eliminated" by this Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2000). App., *infra*, 9a. She then explained that the *Du Bo* rule was more generally inconsistent with this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which held that the omission of an offense element from the petit jury's instructions does not constitute structural error. App., *infra*, 14a-15a. Judge Graber reasoned that "[t]he situation in *Neder* presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not." *Id.* at 16a. "[T]he right to a grand jury finding of probable cause as to each element of the offense," she continued, "is no more important, no more central to the fundamental fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt." *Ibid.*

Judge Graber also rejected the proposition that "there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from an indictment." App., *infra*, 16a. To the contrary, she reasoned, "it is possible (and, indeed, commonplace) to review the omission of an element from a grand jury's indictment for harmless error." *Id.* at 16a-17a. Judge Graber observed that, under this Court's decisions, most errors in grand-jury proceedings are subject to harmless-error analysis. *Id.* at 17a. In particular, she noted that this Court's decision in *United States* v. *Mechanik*, 475 U.S.

66 (1986), "suggests that there is nothing about the nature of a grand jury proceeding that precludes harmless error review." App., *infra*, at 17a-18a. And she noted that this Court's decision in *Cotton*, which held that the omission of a sentence-enhancing fact from a federal indictment did not constitute reversible *plain* error, "rebut[s] the idea that omission of an element from an indictment always renders a criminal proceeding unfair." *Ibid.* Judge Graber also suggested that en banc review was warranted because "six of our sister circuits have held explicitly that they will review defective indictments, challenged at various stages, for harmless error." *Id.* at 19a.

At the same time, Judge Graber noted that this case was "unique" in that it involved "[t]he omission of two elements, one of which was properly instructed and one of which was not." App., *infra*, 21a. She explained that "[t]he first element, materiality, was omitted from [respondent's] indictment for bank fraud as well as from the jury instructions at trial" and that, "[b]y contrast, only the indictment omitted the second element, the federally insured status of the banks defrauded by [respondent]." *Id.* at 20a. Judge Graber suggested that the two errors may "require different answers with respect to the availability or application of a harmless error analysis." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals reaffirmed its rule that the omission of an element of an offense from a federal indictment can never constitute harmless error. The government recently filed a petition for a writ of certiorari in *United States* v. *Resendiz-Ponce*, No. 05-998 (Feb. 8, 2006), in which it sought review of

that rule. Because *Resendiz-Ponce* represents a more suitable vehicle for consideration of that issue, the petition in this case should be held pending the disposition of *Resendiz-Ponce*.

1. For the reasons discussed in greater detail in the government's petition in *Resendiz-Ponce* (at 7-18),[2] the court of appeals erred in this case, as in *Resendiz-Ponce*, by reaffirming the rule from its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), that the omission of an offense element from a federal indictment necessitates automatic reversal. This Court has identified a narrow class of fundamental constitutional errors as so intrinsically harmful that they require reversal without inquiry into whether they had an effect on the outcome. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997) (listing examples). In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that the failure to instruct the petit jury on an element of the offense does not constitute structural error. *Id.* at 8-15. The Court reasoned that "[t]he error at issue here * * * differs markedly from the constitutional violations we have found to defy harmless-error review." *Id.* at 8. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge," the Court explained, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. There is no justification for treating the omission of an offense element from the indictment as a more serious error than the omission of an offense element from the petit jury's instructions.

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[2] A copy of the petition in *Resendiz-Ponce* has been provided to respondent in this case.

The omission of an element from the indictment, like a similar omission from the petit jury's instructions, does not render a criminal prosecution "fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Ibid.* The conclusion that the omission of an offense element from the indictment does not justify automatic reversal is reinforced by this Court's decisions in *United States* v. *Mechanik*, 475 U.S. 66 (1986), which made clear that errors in grand jury proceedings can generally be analyzed for harmlessness, and *United States* v. *Cotton*, 535 U.S. 625 (2002), which held that the omission of an offense element does not seriously affect the fairness, integrity, or public reputation of judicial proceedings for purposes of federal plain-error analysis.

2. The question whether the omission of an offense element from a federal indictment is an error that can be reviewed for harmlessness is an important and recurring one that warrants this Court's review. This case, however, represents a less suitable vehicle than *Resendiz-Ponce* for consideration of that question. In *Resendiz-Ponce*, the indictment omitted a single element of the offense of attempting to reenter the United States after deportation: namely, the commission of an overt act that was a substantial step toward unlawful reentry. Although that element was omitted from the indictment, it was subsequently submitted to the petit jury, in the form of a specific instruction concerning the "overt act" requirement. In this case, by contrast, at least one offense element—materiality—was omitted *both* from the indictment *and* from the jury's instructions. As Judge Graber suggested in her opinion dissenting from the denial of rehearing en banc, see App., *infra*, 21a, it could be argued that, even if the omission of an offense element from an indictment can be harm-

less, the omission of an offense element both from the indictment and from the jury's instructions cannot.

It is unnecessary, however, for the Court to grant plenary review in this case rather than (or in addition to) *Resendiz-Ponce*. All of the cases giving rise to the circuit conflict identified in the government's petition in *Resendiz-Ponce* appear to involve the omission of an offense element (or a fact that increases the penalty for a crime beyond the statutory maximum) only from the indictment, and not from the jury's instructions. Compare *United States* v. *Allen*, 406 F.3d 940, 943-945 (8th Cir. 2005), petition for cert. pending, No. 05-6764 (filed Sept. 29, 2005); *United States* v. *Robinson*, 367 F.3d 278, 285-286 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *United States* v. *Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); *United States* v. *Trennell*, 290 F.3d 881, 889-890 (7th Cir.), cert. denied, 537 U.S. 1014 (2002); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); *United States* v. *Prentiss*, 256 F.3d 971, 981-985 (10th Cir. 2001) (en banc); *United States* v. *Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001); *United States* v. *Spinner*, 180 F.3d 514, 515-516 (3d Cir. 1999). In the apparent absence of a circuit conflict on the specific question whether the omission of an offense element both from the indictment and from the petit jury's instructions can constitute harmless error, the better course would be for this Court to grant review in *Resendiz-Ponce* and address the broader (and more frequently recurring) question whether the omission of an offense element from a federal indictment can be harmless. If the Court answers that question in the affirmative, it would be appropriate for the Court to vacate and remand in this case so

that the court of appeals can, in the first instance, address the question whether, in light of this Court's decisions, the omission of an offense element both from the indictment and from the jury's instructions can also be harmless.[3]

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *Resendiz-Ponce*, No. 05-998, and then disposed of accordingly.

Respectfully submitted.

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FEBRUARY 2006

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[3] An additional complication in this case is that it may or may not involve the omission from the indictment of *multiple* elements, depending on whether the indictment sufficiently alleged that the defrauded banks were federally insured. See App., *infra*, 21a (Graber, J., dissenting from denial of rehearing en banc). The government argued below, and the district court agreed, that the indictment implicitly alleged that element through its use of the phrase "financial institution." C.A. Supp. E.R., Tab C at 5.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-30513, 03-30544

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TIMOTHY W. OMER, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

TIMOTHY W. OMER, DEFENDANT-APPELLEE

Argued and Submitted: Dec. 6, 2004
Filed: Jan. 19, 2005

Before: HAWKINS, THOMAS, and MCKEOWN, Circuit Judges.

PER CURIAM:

Timothy Omer appeals from his jury trial conviction and sentence for bank fraud in violation of 18 U.S.C. § 1344(1). Omer contends that the district court erroneously denied his pretrial motion to dismiss in which he argued that the indictment was fatally deficient because the indictment failed to allege materiality of the fraud. We review the sufficiency of an indictment *de*

novo, *United States v. Pernillo-Fuentes*, 252 F.3d 1030, 1032 (9th Cir. 2001), and we reverse.

"[I]f properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Omer's indictment fails to recite an essential element of the charged offense—materiality of falsehood. Therefore, because Omer properly challenged the sufficiency of the indictment prior to trial, the district court should have dismissed the indictment.

The indictment does allege that Omer knowingly executed or attempted to execute a scheme or artifice to defraud specific financial institutions through a check kiting scheme. Prior to the Supreme Court's decision in *Neder* v. *United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L.Ed.2d 35 (1999), the majority of circuit courts held that a check kiting scheme, in and of itself, could support a conviction for bank fraud under 18 U.S.C. § 1344(1). *See, e.g.*, *United States* v. *LeDonne*, 21 F.3d 1418, 1426 (7th Cir. 1994) (collecting cases); *United States* v. *Sayan*, 968 F.2d 55, 61 n.7 (D.C. Cir. 1992) (same). In *Neder*, however, the Supreme Court held that "materiality of falsehood is an element" of § 1344(1). 527 U.S. at 25, 119 S. Ct. 1827. The Supreme Court determined that the language of § 1344(1), which requires proof of any "scheme or artifice to defraud an institution," incorporates the well-settled common-law meaning of fraud and thus requires the prosecution to prove a misrepresentation or concealment of a material fact to support a conviction. *Id.* at 22-23, 119 S. Ct. 1827. Thus, pursuant to *Neder*, materiality of the

scheme is an essential element of bank fraud in violation of 18 U.S.C. § 1344(1). As such, materiality must be alleged in the indictment.

The government contends that our decision in *United States* v. *Woods*, 335 F.3d 993 (9th Cir. 2003), permits an indictment charging bank fraud to omit an allegation of materiality. The government misreads *Woods*. In *Woods*, we held that proof of a scheme or artifice to defraud does not require the proof of the making of any *specific* false statement. *Id.* at 998-99. However, *Woods* cannot be read for the proposition that *materiality* need not be alleged or proven. Rather, *Woods* analyzed the specificity required of the alleged misrepresentations. *Id.* Thus, we held that the jury instructions in *Woods* did not violate *Neder*, because, as a whole, they accurately included all elements of the offense and adequately informed the jury that materiality of falsehood is an element of fraud. *Id.* at 1000.

Woods is relevant to Omer's contention that *Neder* requires the allegation of a material false statement as an essential element of the offense. We agree with the government that *Neder* does not go that far. It is the materiality of the scheme or artifice that must be alleged; the materiality of a specific statement need not be pleaded. As we noted in *Woods*, "the fraudulent nature of the 'scheme or artifice to defraud' is measured by a non-technical standard." *Id.* at 998.

"Thus, schemes are condemned which are contrary to public policy or which fail to measure up to the reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society." *Id.* (quoting *United States* v. *Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)). *Neder*

did not undermine this non-technical standard for measuring fraud, which does not require proof of a specific false statement. *Id.*

In sum, the indictment's failure to recite an essential element of the charged offense, namely the materiality of the scheme or artifice to defraud, is a fatal flaw requiring dismissal of the indictment. Given this resolution of the appeal, it is unnecessary for us to decide any other issue urged by the parties.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-30513, 03-30544

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TIMOTHY W. OMER, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

TIMOTHY W. OMER, DEFENDANT-APPELLEE

Oct. 31, 2005

Before HAWKINS, THOMAS, and MCKEOWN, Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the case en banc, but the request failed to receive a majority of votes of the nonrecused active judges in favor of en banc rehearing.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

GRABER, Circuit Judge, with whom KOZINSKI, O'SCANNLAIN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc.

I respectfully dissent from the court's decision not to take this case en banc. We should take this opportunity to reconsider the rule that our prior precedent required the three-judge panel to apply: *automatic* reversal of any conviction in which the defendant timely, and correctly, objected that an element of the crime was missing from the indictment. *See United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (holding that such a deficiency is not subject to harmless error review). An absolute rule makes no sense. When the defendant has actual notice of the missing element in advance of trial, evidence of the missing element is introduced, the jury is properly instructed about the element, and the finder of fact finds the element beyond a reasonable doubt, the defendant may not have been prejudiced by the omission; reversal should not be compelled. We ought not cling to a rule that drains judicial resources when we can review—indeed, have reviewed, in very similar circumstances—the prejudice caused by the omission of an element from an indictment.

A. *The* Du Bo *decision, establishing the "automatic reversal rule" at issue, rested on three premises.*

The court in *Du Bo* held that, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is . . . a fatal flaw requiring dismissal of the indictment." 186

F.3d at 1179. We supported that automatic reversal rule with three premises.

The first premise was jurisdictional. We asserted that an indictment that omits an element "does not properly allege an offense against the United States" and thereby "leaves nothing for a petit jury to ratify." *Id.* at 1180 (internal quotation marks omitted). We drew this idea in part from a Fourth Circuit decision holding that harmless error is inapplicable because the omission of an essential element deprives the court of jurisdiction: "The absence of prejudice to the defendant in a traditional sense does not cure a substantive, jurisdictional defect in an indictment." *United States* v. *Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (en banc) (emphasis added); *see also Du Bo*, 186 F.3d at 1180 (citing *Hooker*). We also appeared to hold that the jurisdictional basis for our rule of automatic reversal was supported by *Russell* v. *United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962), and *Stirone* v. *United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). *See Du Bo*, 186 F.3d at 1179-80 (relying on those cases).[1]

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[1] Other circuits also have interpreted *Russell* and *Stirone* to require automatic reversal. *See, e.g., United States* v. *Spinner*, 180 F.3d 514, 516-17 (3d Cir. 1999); *Hooker*, 841 F.2d at 1230. Some of those circuits are rethinking the foundations of that position. *See, e.g., United States* v. *Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003) (relying on later Supreme Court precedents), cert. denied, ___U.S. ___, 125 S. Ct. 627, 160 L. Ed. 2d 456 (2004); *United States* v. *Prentiss*, 256 F.3d 971, 981-85 (10th Cir. 2001) (en banc) (per curiam) (opinion by Baldock, J.) (rejecting applicability of cases, such as *Stirone*, that predated *Chapman* v. *California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); see also 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3 (2d ed. 1999 & Supp. 2005).

Second, we said that omissions from a grand jury indictment, unlike omissions from jury instructions, simply are not susceptible to harmless error review. *Du Bo*, 186 F.3d at 1179-80.

Finally, we expressed a desire to give defendants an incentive to bring timely objections. We limited the automatic reversal rule to timely challenges, reasoning that under harmless error review, filing a pretrial motion would be "self-defeating" because the very filing of the motion would demonstrate that the defendant had notice of the missing element. *Id.* at 1180 n.3.

In this case, Defendant Timothy W. Omer raised a timely challenge to the omission of two elements from the indictment against him for bank fraud. We applied the rule of *Du Bo* and reversed Defendant's conviction because of one of those omissions.[2] At the time we

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[2] Defendant was charged with bank fraud in violation of 18 U.S.C. § 1344(1). The indictment alleged that Defendant and an accomplice "knowingly executed or attempted to execute a scheme or artifice to defraud" four financial institutions by way of a check-kiting scheme. The indictment described that "scheme or artifice" in some detail but did not allege that the scheme was *material* to—i.e., "capable of influencing"—the bank's decision to release funds, as required by *Neder* v. *United States*, 527 U.S. 1, 16, 24-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The indictment also failed to allege that the financial institutions were federally insured. *See United States* v. *Ali*, 266 F.3d 1242, 1243 (9th Cir. 2001) (" 'Proof of federally-insured status of the affected institution is, for both section 1344 and section 1014, a jurisdictional prerequisite as well as an element of the substantive crime.' " (quoting *United States* v. *Key*, 76 F.3d 350, 353 (11th Cir. 1996) (per curiam))). The district court denied Defendant's pretrial motion to dismiss the indictment for failure to allege those two elements.

After a trial, the jury convicted Defendant. The jury instructions did not mention "materiality," but they did require the jury to find beyond a reasonable doubt that the affected institutions

decided *United States* v. *Omer*, 395 F.3d 1087 (9th Cir. 2005) (per curiam), however, none of the three rationales articulated in *Du Bo* supported continued application of the automatic reversal rule.

B. *Supreme Court precedent does not support the jurisdictional rationale for* Du Bo.

After we issued *Du Bo*, the Supreme Court decided *United States* v. *Cotton*, 535 U.S. 625, 634, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). *Cotton* directly eliminated the jurisdictional premise for the automatic reversal rule. In *Cotton*, the Court held that an indictment containing the essential elements of the offense is not a jurisdictional prerequisite to a criminal prosecution. *See id.* at 630, 122 S. Ct. 1781 (stating that "defects in an indictment do not deprive a court of its power to adjudicate a case").

The decisions of *Russell* and *Stirone*, which we cited in support of our jurisdictional rationale in *Du Bo*, are distinguishable from *Du Bo* and do not compel the automatic reversal rule. *Russell* and *Stirone* contain strong, general admonitions about protecting the Fifth Amendment right to have a grand jury determine probable cause. *See Russell*, 369 U.S. at 770, 82 S. Ct. 1038 ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the

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were federally insured. The panel reversed Defendant's conviction because the indictment omitted the "materiality" element. *United States* v. *Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005) (per curiam) ("[T]he indictment's failure to recite an essential element of the charged offense, namely the materiality of the scheme or artifice to defraud, is a fatal flaw requiring dismissal of the indictment.").

guaranty of the intervention of a grand jury was designed to secure."); *see also Du Bo*, 186 F.3d at 1179-80 (holding that, when "[w]e may only guess whether the grand jury" found probable cause to support the missing element, "[r]efusing to reverse . . . would impermissibly allow conviction on a charge never considered by the grand jury" (citing *Stirone*, 361 U.S. at 219, 80 S. Ct. 270)). But both *Russell* and *Stirone* were concerned with preventing the government from pursuing a theory of the crime not presented to the grand jury; the Court sought to prevent that kind of a substantive "constructive amendment" of the indictment.[3] *See Cotton*, 535 U.S. at 631, 122 S. Ct. 1781 (describing

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[3] In *Russell*, the defendants were convicted under 2 U.S.C. § 192 of willfully refusing to "answer any question pertinent to the question under inquiry" in a congressional hearing. 369 U.S. at 751 & n.2, 752, 82 S. Ct. 1038. The Court reversed their convictions because their indictments did not identify the subject of the pertinent congressional hearings. The Court's chief concern was that one of the defendants had not received notice "of the nature of the accusation against him." *Id.* at 767, 82 S. Ct. 1038. The Court also held that, even if a bill of particulars could provide the defendant with notice, it could not ensure that the grand jury had determined the question under inquiry. *Id.* at 770, 82 S. Ct. 1038. To protect the right to grand jury indictment, the Court applied the "settled rule" that only the grand jury may amend the indictment and, accordingly, reversed the conviction. *Id.* at 770-71, 82 S. Ct. 1038.

In *Stirone*, the defendant was indicted for unlawfully interfering with interstate commerce by obstructing the movement of sand across state lines. 361 U.S. at 213-14, 80 S. Ct. 270. At trial, however, the jury was permitted to convict the defendant for interfering either with the movement of sand or with the movement of steel. *Id.* at 214, 80 S. Ct. 270. The Court held that this alternate factual theory was more than a mere variance in proof; it presented the risk of conviction for an offense different from that which the grand jury had charged. Accordingly, the Court reversed the conviction. *Id.* at 217-18, 80 S. Ct. 270.

Russell and *Stirone* as reflecting the "settled proposition of law" that "an indictment may not be amended except by resubmission to the grand jury"). Many cases, however, including the present one, do not involve a new or different theory, so it is questionable whether the Supreme Court's stated rationale must apply across the board to every kind of missing element. *See, e.g., United States* v. *Prentiss*, 256 F.3d 971, 984 n.11 (10th Cir. 2001) (en banc) (per curiam) (opinion by Baldock, J.) (distinguishing the constructive amendment at issue in *Stirone* from the mere failure to allege an essential element because, in the latter case, the indictment "sought to charge Defendant with the sole crime for which the jury convicted him").

Additionally, *Russell* and *Stirone* were decided before *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), in which the Court established that constitutional errors can be harmless. Even more importantly, *Russell* and *Stirone* were decided before *Neder* v. *United States*, 527 U.S. 1, 7-15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), a case that is significant here both for its explanation of "structural error" (discussed below) and its substantive holding that omission of an element of the charged crime from jury instructions can be harmless. *See also United States* v. *Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc) (reviewing for harmless error because *Neder's* list of structural errors did not include *Stirone* and because *Neder* held that omissions from jury instructions can be harmless), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Sept. 29, 2005) (No. 05-6764). As our sister circuits have done, we can distinguish *Russell* and *Stirone*.

C. *Our own precedents undermine* Du Bo's *premise that omissions from the grand jury are not susceptible to harmless error review.*

In *Du Bo*, we asserted that omissions from the grand jury are, in general, not proper fodder for harmless error review. We reasoned that assessing grand jury error would require the court to "'guess as to what was in the minds of the grand jury.'" *Du Bo*, 186 F.3d at 1179 (quoting *United States* v. *Keith*, 605 F.2d 462, 464 (9th Cir. 1979)). Our own precedents undermine this rationale.

When defective indictments are challenged for the first time on appeal, our cases do not mandate automatic reversal but, rather, require us to review for plain error. In so doing, we perform a prejudice analysis nearly identical to the analysis that we refused to perform in *Du Bo*. *See United States* v. *Velasco-Medina*, 305 F.3d 839, 847 (9th Cir. 2002) (holding that "any defect in the indictment was harmless"); *United States* v. *Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002) ("*Leos* cannot meet the third condition [of the plain error standard]."). Except for the burden of proof, the third element of the plain error analysis is identical to the harmless error analysis: Both require us to determine whether the error "affect[ed] substantial rights," i.e., prejudiced the defendant. *United States* v. *Jordan*, 291 F.3d 1091, 1095-96 (9th Cir. 2002). *Compare Cotton*, 535 U.S. at 631, 122 S. Ct. 1781 (setting forth the four prongs of plain error review: (1) an error; (2) that is plain; (3) that "*affect[s] substantial rights*"; and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" (alteration in original) (emphasis added) (internal quotation marks omitted)), *with* Fed. R. Crim. P. 52(a)

("Any error, defect, irregularity, or variance that does not *affect substantial rights* must be disregarded." (emphasis added)).

In *Velasco-Medina* and *Leos-Maldonado*, we held that omissions from indictments did not affect a defendant's "substantial rights" because the defendant had notice of the missing element, because the weight of the evidence in the trial record established that element, and because the petit jury found the element proved beyond a reasonable doubt. *Velasco-Medina*, 305 F.3d at 847; *Leos-Maldonado*, 302 F.3d at 1064-65. Those holdings make it impossible to conclude that omissions from indictments are exempt from Rule 52(a) because they "are so intrinsically harmful," *Neder*, 527 U.S. at 7, 119 S. Ct. 1827, that they necessarily "affect substantial rights." *See also id.* (describing structural errors as those that "'defy analysis by "harmless error" standards'" (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991))).

Even more significant than those plain error decisions is a case in which we applied harmless error principles to review an indictment that was challenged in district court after the trial began. *See United States* v. *James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (concluding that "[t]he error in the indictment could have had no effect on the outcome of the trial and was harmless beyond a reasonable doubt" (emphasis added)); *cf. Du Bo*, 186 F.3d at 1180 n.3 (stating that its rule of automatic reversal applies only to timely—that is, pretrial—challenges).

As our cases demonstrate, it simply is not true, as we suggested in *Du Bo*, 186 F.3d at 1179-80, that it is impossible to review an omission for harmlessness. In the untimely challenge cases, we have acknowledged that it

is possible to review the prejudice caused by the omission of an element from an indictment, and in fact we have conducted both harmless error and plain error review.

D. *Encouraging timely objections to indictments is an insufficient justification for retaining* Du Bo's *automatic reversal rule.*

As noted, we have applied harmless error principles to the omission of elements from grand jury indictments in cases where the defendant did not object before trial. If we accept the view that it is possible to review defective indictments for harmless error, the only remaining basis for *Du Bo*'s rule is our desire to give defendants an incentive to bring timely objections. *See Du Bo*, 186 F.3d at 1180 n.3 (giving a practical reason for applying a rule of automatic reversal to timely challenges to indictments).

There is nothing wrong with reviewing a timely argument under a more favorable standard of review than an untimely one; we do it all the time.[4] But the fact that a defendant brings a timely objection, standing alone, cannot be sufficient to create an exemption from the general rule that errors having no effect on the outcome of a proceeding must be disregarded. See Fed. R. Crim. P. 52(a). Structural errors exempt from Rule 52(a) are "basic protections without which . . . no criminal punishment may be regarded as fundamentally

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[4] Indeed, even if we eliminated the rule of automatic reversal, we would continue to review omissions challenged before trial more rigorously. Our established rule for challenges that come at later stages of the district court proceeding is to "liberally construe the indictment in favor of validity." *United States* v. *Chesney*, 10 F.3d 641, 643 (9th Cir. 1993).

fair." *Neder*, 527 U.S. at 8-9, 119 S. Ct. 1827 (internal quotation marks omitted).[5]

Neither the nature of the error, nor its amenability to harmless error review, is affected by the timing of a defendant's challenge. Therefore, the timeliness of a defendant's challenge cannot justify *Du Bo*'s rule of automatic reversal.

E. *Not only are the premises articulated in support of* Du Bo*'s automatic reversal rule insufficient, but Supreme Court precedent suggests the opposite result.*

The Supreme Court held in *Neder* that the omission of an element from jury instructions is subject to harmless error review. The element omitted in *Neder* was materiality, exactly the same as one of the two elements omitted from Defendant's indictment in the present case. In *Neder*, the Court ruled that the omission of the materiality element from the jury instructions was harmless beyond a reasonable doubt because the trial record contained no evidence that could have led a rational jury to find that the defendant's false statements were immaterial. 527 U.S. at 16-20, 119 S. Ct. 1827.

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[5] Even when we have held that an error is subject to a rule of automatic reversal without deeming it "structural," as in *United States* v. *Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc), we did so because the error was "simply not amenable to harmless-error analysis." In this connection, I also question our holding in *Annigoni*, that even a nonstructural error can be subject to a rule of automatic reversal. Three years after we issued that decision, *Neder* reiterated the Supreme Court's two-option approach and held that, "[f]or all other [nonstructural] errors, reviewing courts must apply" a harmless error analysis. 527 U.S. at 7, 119 S. Ct. 1827 (emphasis added).

The situation in *Neder* presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not. Yet, the right to a grand jury finding of probable cause as to each element of the offense is no more important, no more central to the fundamental fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt. *Cf. Cotton*, 535 U.S. at 634, 122 S. Ct. 1781 ("Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power. No doubt that is true. But that is surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt." (citation omitted)).

In deciding *Omer*, the panel distinguished *Neder* on the ground that, whereas an error in jury instructions can be assessed with reference to the trial record and the overall fairness of the trial, assessing a grand jury error would require the court to "'guess as to what was in the minds of the grand jury'" and, in any event, could not be remedied by a fair trial. *Du Bo*, 186 F.3d at 1179 (quoting *Keith*, 605 F.2d at 464). As demonstrated above, that reasoning—that there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from an indictment—is undermined by a variety of cases from the Supreme Court, our court, and other circuits in which courts actually do evaluate the prejudice caused by defective grand jury indictments. The cases show that, as a matter of legal doctrine, it is possible (and, indeed, commonplace) to

review the omission of an element from a grand jury's indictment for harmless error.

Under Supreme Court precedent, most errors in grand jury proceedings are reviewed for harmless error. *See Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) ("We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."); *United States* v. *Mechanik*, 475 U.S. 66, 70, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) (same).[6] In *Mechanik*, the Court held that, although the error "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged," the defendants' later conviction by a petit jury rendered the error harmless. 475 U.S. at 70, 106 S. Ct. 938; *see id.* (stating that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt"). At the very least, *Mechanik* suggests

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[6] The only error in grand jury proceedings that the Supreme Court has considered structural, and thus subject to automatic reversal, is discrimination on account of race, and possibly sex, in the selection of grand jurors. *See Vasquez* v. *Hillery*, 474 U.S. 254, 260-63, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (race discrimination); *Bank of Nova Scotia*, 487 U.S. at 257, 108 S. Ct. 2369 (discussing its reversal because of sex discrimination in *Ballard* v. *United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)). In *Mechanik*, the Court interpreted the rule of *Vasquez* as a "prophylactic means of deterring grand jury discrimination in the future" and stated that such "considerations have little force outside the context of racial discrimination in the composition of the grand jury." 475 U.S. at 70 n.1, 106 S. Ct. 938.

that there is nothing about the nature of a grand jury proceeding that precludes harmless error review. In the light of *Mechanik*, if the defendant had actual notice of all elements, all were proved, and the jury was properly instructed, a missing element from a charge in the indictment can be harmless error.

The Supreme Court's cases enumerate a class of "structural errors" that are not susceptible to harmless error review. *See Neder*, 527 U.S. at 9, 119 S. Ct. 1827 (listing such "structural errors"). The Court's decision in *Cotton* makes it extremely difficult to categorize omissions from indictments as structural errors. In *Cotton*, the Court held that one such omission "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" because the evidence of the missing element was "overwhelming and essentially uncontroverted" at trial. 535 U.S. at 632-33, 122 S. Ct. 1781 (internal quotation marks omitted). In reaching that conclusion, the Court avoided deciding directly whether the omission of an element from an indictment can be reviewed for prejudice. *See Jordan*, 291 F.3d at 1096 n.7 (noting that *Cotton* "might have been significant" to our harmless error analysis had the Supreme Court rested its decision on the "substantial rights" prong of the "plain error review"). But *Cotton* remains relevant to rebut the idea that omission of an element from an indictment always renders a criminal proceeding unfair. *Cf. Neder*, 527 U.S. at 9, 119 S. Ct. 1827 (deciding that omission of an element from jury instructions is not structural error, in part, because in *Johnson* v. *United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), the Court had decided that the same error did not satisfy the fourth element of the plain error analysis); *United States* v. *Robinson*, 367

F.3d 278, 285 (5th Cir.) ("We have interpreted *Cotton* also to require the application of harmless error review where an indictment is defective and the defendant preserves the error by proper objection."), cert. denied, ___ U.S. ___, 125 S. Ct. 623, 160 L. Ed. 2d 466 (2004).

F. *Other circuits are increasingly abandoning* Du Bo*-like precedents in favor of harmless error review of grand jury omissions.*

Since 2001, six of our sister circuits have held explicitly that they will review defective indictments, challenged at various stages, for harmless error. *See Allen*, 406 F.3d at 945 (reviewing for harmless error an omission challenged at sentencing);[7] *Robinson*, 367 F.3d at 285 (reviewing for harmless error an omission challenged on appeal); *United States* v. *Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003) (reviewing for harmless error an omission challenged on appeal, relying on *Mechanik* and *Cotton*), cert. denied, ___ U.S. ___, 125 S. Ct. 627, 160 L. Ed. 2d 456 (2004); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002) (reviewing for harmless error an omission challenged after the jury was impaneled but before trial began); *Prentiss*, 256 F.3d at 981 (overruling the 10th Circuit's earlier *Du Bo*-like precedents and relying on *Neder* and *Mechanik* to provide harmless error review for an omission challenged on appeal); *United States* v.

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[7] *Allen* was a death penalty case. The indictment was defective because it omitted any statutory aggravating factor. 406 F.3d at 943. The defendant "presciently" objected in the district court. *Id.* The court rejected the defendant's reliance on *Stirone*, pointing out that *Chapman*, *Fulminante*, and *Neder* had changed the landscape. Adopting essentially the analysis contained in this dissent, the court held that the defect in the indictment was subject to harmless error review. *Allen*, 406 F.3d at 945-46.

Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir. 2001) (reviewing for harmless error an omission challenged on appeal); see also 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a) (2d ed. 1999 Supp. 2005) ("[B]y a conservative count, at least five federal circuits have abandoned the traditional position mandating automatic reversal, and substituted harmless error review, for appellate review of a timely challenge to an indictment's failure to allege an essential element of the offense."). *But see United States* v. *Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004) (expressly declining to decide whether harmless error review is available).

G. Omer *cleanly presents an opportunity to reconsider the rule of automatic reversal.*

In this case, Defendant cited the omission of two elements from his indictment in support of his argument for automatic reversal. The first element, materiality, was omitted from Defendant's indictment for bank fraud as well as from the jury instructions at trial. By contrast, only the indictment omitted the second element, the federally insured status of the banks defrauded by Defendant. The jury was properly instructed about the second element at trial and found beyond a reasonable doubt that the financial institutions at issue were federally insured.

The panel's decision addressed only the first omission. Applying *Du Bo*, 186 F.3d at 1179, the panel held that "the indictment's failure to recite an essential element of the charged offense, namely the materiality of the scheme or artifice to defraud, is a fatal flaw requiring dismissal of the indictment." *Omer*, 395 F.3d at 1089. Although the panel reversed solely because of the indictment's failure to allege materiality, the indictment's failure to allege that the banks were federally

insured likewise would have been subject to the rule of automatic reversal because Defendant's challenge was timely. *See James*, 980 F.2d at 1318 (stating that the failure of the indictment in *United States* v. *Coleman*, 656 F.2d 509, 511 (9th Cir. 1981), to allege that the bank was federally insured was cured by the indictment's reference to the statute setting forth that element, and thus did not require automatic reversal, *only* because the defendant's challenge was not timely).

The omission of two elements, one of which was properly instructed and one of which was not, provides a unique opportunity to decide whether those two different, commonly occurring situations require different answers with respect to the availability or application of a harmless error analysis. *See, e.g.*, *Jordan*, 291 F.3d at 1096 (holding that, when drug quantity was neither alleged in the indictment nor proved to the jury beyond a reasonable doubt, the omission was not harmless beyond a reasonable doubt). In my view, the court en banc ought to abolish the rule of automatic reversal only in the most troubling subset of cases: convictions in which the defendant had notice of, and the jury was properly instructed regarding, the element of the crime missing from the indictment.[8]

H. *Conclusion*

I am confident that the indictment's failure to allege that the defrauded banks were federally insured did not prejudice Defendant. He does not dispute that he actually knew that federally insured status was an element of the crime. Moreover, certificates of federally insured status for each bank were provided to Defen-

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[8] My concern, in other words, is not the result in *Omer*, but the analysis that the panel was required to use to reach it.

dant (albeit late), evidence of federal insurance was introduced at trial, the jury was instructed that it must find that the banks were federally insured and, by its verdict, the jury did so find beyond a reasonable doubt. This combination of factors plainly would satisfy the prejudice inquiry that we previously have used in untimely challenge cases and that other circuits have adopted. Nonetheless, *Du Bo* requires reversal for this defect alone.[9]

A result that makes as little common sense as that, on a recurring issue that has prompted a growing consensus in our sister circuits that harmless error review is appropriate, should result in en banc rehearing. Our practice of automatically reversing convictions when a defendant timely objects that an element of the offense was omitted from the indictment is out of step with *Neder*, *Cotton*, *Mechanik*, and our own cases reviewing the prejudice caused by the omission of elements from indictments. Accordingly, I respectfully dissent.

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[9] By contrast, the jury was not instructed on the missing materiality element. In my view, the omission of the element from both the indictment and the instructions was not harmless beyond a reasonable doubt.

(4)

No. 05-1101

Supreme Court, U.S.
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In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TIMOTHY W. OMER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should deny the petition because the ruling of the Court of Appeals that a district court's denial of a pre-trial motion to dismiss an indictment which omits an essential element of the offense is reversible error is in complete accord with precedent set by this Court, prior decisions of the Court of Appeals, and all decisions of other courts of appeal?

2. If this Court grants the petition, whether it is appropriate for this Court to stay proceedings in this case while it decides *United States v. Resendiz-Ponce,* an appellate decision rendered almost ten months after the panel decision in this case?

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STATEMENT OF THE CASE

The Petitioner (herein the "Prosecution" or "Petitioner") obtained an indictment against Timothy Omer (herein "Omer" or the "Defense") alleging bank fraud in violation of 18 U.S.C. §1344(1). The indictment omitted an essential element of the offense – materiality. Omer filed a timely, pre-trial motion to dismiss the indictment pursuant to Rule 12(b)(3)(B) of the FEDERAL RULES OF CRIMINAL PROCEDURE (herein "F.R.Cr.Pro."). The District Court denied Omer's motion.

Prior to trial, the Defense also moved for a disclosure of the grand jury transcripts. The Prosecution objected. The District Court denied the Defense's motion. As a result, the District Court denied Omer's motion to dismiss the indictment without reviewing grand jury transcripts. A jury convicted Omer at trial. He appealed.

On appeal, Omer asserted that the District Court's denial of his timely, pretrial motion to dismiss the indictment which failed to allege a materially false statement was reversible error. The Prosecution asserted that a materially false statement was not an element and that, even if it was, the error was harmless. After reviewing briefs and hearing oral argument, a three-judge panel of the Court of Appeals held that materiality was an element of federal bank fraud. It also held that the District Court's denial of Omer's timely, pre-trial motion to dismiss was reversible error. The Prosecution petitioned for a rehearing *en banc*. The Court of Appeals denied the Prosecution's petition.

The Petitioner now asks this Court to grant a writ of *certiorari*. It states that the issue here is much broader than that decided by the Court of Appeals. It suggests the

issue is: "Whether, in a federal prosecution, the omission of an element of the offense both from the indictment and from the petit jury's instruction can constitute harmless error." As explained herein, the issue in this case is not whether a defective indictment can ever be the subject of a harmless error analysis, but rather, whether a trial court's denial of a motion to dismiss an indictment which omits an essential element of an offense is reversible error.

A. Statutory Context

18 U.S.C. §1344(1) provides that whoever knowingly executes, or attempts to execute, a scheme or artifice to defraud a financial institution shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both. While the statute does not specifically define the term "scheme or artifice to defraud," in 1999 this Court held that a materiality was an essential element of the federal fraud statutes. *Neder v. United States*, 527 U.S. 1, 25 (1999).

B. Factual Background

The Petitioner has set forth facts not supported by the record. Rather than attempt to address those facts individually, the Defense respectfully suggests the following is a fairer summary of the facts:

Tim Omer is a businessman who resides in Yakima, Washington. He has no prior criminal history and is the father of two minor boys. In early summer of 2001, Ms. Regan Tabor, who was residing in Montana, asked Omer to purchase some electronic products for her in Washington. She told him she was buying the products for a

hospital foundation. Omer was pursuing Tabor romantically at the time. He hoped to marry her.

Tabor, through a series of misrepresentations to Omer, convinced him to engage in floating checks. She sent him checks from Montana to deposit in his account and directed him to send checks from Washington for deposit in her account. At a time late in this arrangement, Omer became aware that the float was as high as $15,000. He confronted Tabor. She insisted her account was short of funds because the hospital foundation was slow in paying her. She assured Omer that this was only a short-term problem.

Unbeknownst to Omer, Tabor was floating hundreds of thousands of dollars of checks between several accounts she controlled in Montana. There was no hospital foundation. She was engaging in an INTERNET marketing scheme. Tabor was also siphoning hundreds of thousands of dollars from her respective accounts. When the float failed and the respective banks closed their accounts, Omer ultimately learned that the banks had lost approximately $256,000.

Omer had received no profit from the check float or from Tabor's business. Throughout the course of his dealings with Tabor, Omer's personal expenditures from his account were less than the monies he deposited from his earnings and money received from his mother. When his account was closed, he not only lost approximately $4,000.00 of his own deposits, but owed his bank $90,000.00 for Tabor's bad checks that his bank had honored.

At trial, Defense Counsel cross-examined the two bank employees who had contact with Omer. Both admitted that statements made by Omer were not material to their decision regarding the maintenance or closing of his account, or honoring the checks drawn on Omer's account.

C. Decision of the Court of Appeals

On appeal, Omer argued that the District Court erred when it denied his timely, pre-trial motion to dismiss. Based on this Court's holding in *Neder*, Omer argued that the indictment was defective because it failed to allege that Omer made any false statement, much less a materially false statement.

Omer based his position on this Court's ruling in *Williams v. United States*, 458 U.S. 279, 290 (1982). In *Williams*, this Court noted that to interpret that a drawer of a check has made a "false statement" whenever he has insufficient funds in his account at the moment the check is presented would render a wide range of unremarkable conduct violative of federal law which is already addressed in a comprehensive fashion by state bad check statutes. *Id.* at 279.

While the Indictment did not allege that Omer made any statements, it did allege that he engaged in writing and depositing checks which, at the time of deposit, he knew lacked sufficient funds in the drawee bank to cover the checks. The Indictment, however, failed to allege that Omer's conduct was material to the banks' losses.

The Court of Appeals stopped short of holding that a materially false "statement" is an essential element of bank fraud. The Court, however, did agree that in *Neder*

this Court held that materiality is an element of federal bank fraud. It also held that the District Court's denial of Omer's timely, pretrial motion to dismiss the indictment, thereby allowing an indictment that did not allege a federal offense to be tried and presented to the petit jury, was reversible error. *United States v. Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005).

The panel filed its decision on January 19, 2005. The Prosecution petitioned for a rehearing *en banc*. The Prosecution then asked for and obtained a forty-five day extension for filing its petition for rehearing. See attached Appendix "A." The Prosecution then asked for and obtained an additional seven-day extension. See attached Appendix "B."

While the Prosecution's petition for rehearing was pending in this case, the Court of Appeals decided *United States v. Resendiz-Ponce*, 425 F.3d 729 (2005). In that case, the Court of Appeals also held a trial court's denial of a timely, pre-trial motion to dismiss the indictment because the prosecution had failed to include an essential element of the offense in the indictment was reversible error. *Id.* at 733. The Court of Appeals decided *Resendiz-Ponce* nearly ten months after the panel decision in this case. The prosecution did not seek a petition for rehearing in *Resendiz-Ponce*.

The Court of Appeals denied the Prosecution's petition for rehearing in this case on October 31, 2005, twenty days after deciding *Resendiz-Ponce*. The Petitioner then sought and obtained from the Court of Appeals a ninety-day stay of mandate in this case. See attached Appendix "C." The Petitioner then moved to further extend the stay of mandate until February 28, 2006, stating that it would need at

least until that date to prepare its petition in this case "due to the press of other matters." See attached Appendix "D." By February 8, 2006, however, the Petitioner had managed to overcome the press of other matters so as to draft and file its Petition for Writ of *Certiorari* in *Resendiz-Ponce*. The Prosecution then filed its petition in this case on February 28, 2006 requesting a stay of these proceedings pending the outcome in *Resendiz-Ponce*.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals in this case adheres to precedent set by this Court, and is in complete accord with other decisions of that Court and other federal appellate court decisions. The Prosecution has been able to complain that the decision of the Court of Appeals conflicts with decisions of this Court and other courts of appeals only because it has incorrectly phrased the issue in this case and relied upon authorities which are factually distinguishable from this case.

The Prosecution has suggested the Court of Appeals was faced with determining whether an indictment which omits an element of an offense can ever constitute harmless error. Certainly, this Court and appellate courts have answered that question in the affirmative. They have done so, however, when the defendant has failed to file a timely motion to dismiss a defective indictment, thereby arguably waiving his right to challenge the indictment at all, or when the indictment failed to allege a sentencing factor and the reviewing courts were able to determine that the grand jury was, in fact, presented with the evidence of the sentencing factor when it returned the indictment.

Rather than treat a delay in objecting to the sufficiency of an indictment as a waiver, however, this Court and most federal circuit courts, instead, have applied a "plain error" analysis. In doing so, this Court and the federal circuit courts have looked at the entire evidentiary record at the time the challenge was made. If the record reflected that the prosecution had proved, or the defendant had admitted, the existence of the omitted element prior to the challenge, courts have held the error in the indictment to be harmless. This Court and lower courts have reversed only upon finding that the defendant had proven that the error somehow prejudiced the defendant.

The real question here, however, is whether the trial court's denial of Omer's timely, pretrial motion to dismiss an indictment which omitted an essential element of the offense was reversible error. In this case, the Court of Appeals answered that question by saying: "Yes." In doing so, the decision of the Court of Appeals is in complete accord with this Court's decisions, longtime precedent of the Court of Appeals, and all other circuit court decisions. In short, the Prosecution's assertion that this decision created a conflict with decisions of this Court and those of other circuits is without merit. Accordingly, the Defense respectfully asks this Court to deny the Prosecution's petition.

Finally, if this Court were to grant the Prosecution's petition, the Prosecution has asked that this case be held in abeyance pending the outcome of another case, a panel decision filed ten months after the panel decision in this case. The Prosecution's request smacks of chronological forum shopping and relies upon no authority. Accordingly, the Defense respectfully asks this Court to deny the

Prosecution's request to hold these proceedings in abeyance if this Court were to grant the Prosecution's petition.

REASONS TO DENY THE PETITION

I. THE DECISION OF THE COURT OF APPEALS IS IN COMPLETE ACCORD WITH PRECEDENT SET BY THIS COURT, PRIOR DECISIONS OF THE COURT OF APPEALS, AND ALL DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

Rule 10 of the RULES OF THE SUPREME COURT OF THE UNITED STATES makes it clear that review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 recognizes that a decision which conflicts with precedent set by this Court or which conflicts with other circuit opinions may justify granting a petition for writ of certiorari. As explained below, however, the Petitioner's complaint that the decision of the Court of Appeals in this case has created a conflict is not well founded. Accordingly, the Prosecution's petition should be denied.

A. THE PANEL'S DECISION FOLLOWS THE PRECEDENT SET BY THIS COURT.

At common law the valuable function of the grand jury was to stand between the prosecutor and the accused and to determine whether the charge was filed upon credible testimony. *Hail v. Hinkel*, 201 U.S. 43, 59 (1906). This Court has held that the Fifth Amendment to the United States Constitution guarantees that no citizen may be accused of a federal felony and held for trial unless

indicted by a grand jury. As early as the late nineteenth century, this Court recognized that an indictment which fails to recite an essential element of an offense is fatally defective. *United States v. Carll*, 105 U.S. 611, 613 (1881). "Incorporated into the Fifth Amendment by the Founders, there is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor." *Costello v. United States*, 350 U.S. 359, 362 (1956). In *Russell v. United States*, 369 U.S. 749 (1962) this Court noted that the constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury was first intervened reflects centuries of antecedent development of common law. *Id.* at 761.

In *Russell*, the prosecution failed to allege an essential element of an offense. The defendants made proper, timely motions to quash the indictment. *Id.* at 753. This Court reversed the convictions, writing: "The very purposes of the requirement that a man be indicted by a grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." (Citing *Stirone v. United States*, 361 U.S. 212 (1960)). *Russell* at 1051.

In *Stirone* the prosecution alleged one offense in the indictment and proved a different offense at trial. *Stirone*, 361 U.S. at 214. The defendant made proper, timely objections when the trial court allowed the evidence, and timely challenged the court's instruction that the jury could convict on this evidence. *Id.* This Court determined that the trial court had effectively amended the indictment. *Id.* at 215. This Court went on to reverse the conviction because it was not based upon an indictment brought by a grand jury although the petit jury had found beyond a reasonable doubt that the defendant had committed a

separate, unindicted federal offense. *Id.* at 219. This Court based its decision on the fact that "we cannot know whether the grand jury would have included in its indictment a charge" [different from the one found in the indictment]. *Id.*

In 1999, this Court held that materiality is an element of federal bank fraud. *Neder v. United States*, 527 U.S. 1, 20, 25 (1999). The Petitioner has conceded that premise. Nevertheless, years later the Prosecution obtained a grand jury indictment against Omer which omitted this element. Omer made a timely, pre-trial motion to dismiss the defective indictment. The District Court denied the motion.

Following this Court's precedent recited above, the Court of Appeals correctly held that the trial court's ruling constituted error. Then, in accord with this Court's ruling in *Chapman v. California*, 386 U.S. 18 (1967) the Court of Appeals determined the error was not subject to harmless error analysis. It was reversible error.

In *Chapman* this Court recognized that sometimes error can be harmless if it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. *Id.* at 24. Of course, when the error is the district court's refusal to dismiss an indictment when it is not known whether evidence regarding an essential element of an offense has been presented to the grand jury, that error will always contribute to the verdict. If the court had not committed the error, the indictment would have been properly dismissed. There would have been no guilty verdict. Accordingly, a district court's denial of a pre-trial motion to dismiss an indictment when the court is unable to determine whether the grand jury considered evidence

regarding an essential element of the offense will never be subject to a *Chapman* analysis because it will always contribute to the jury's finding of guilt.

The Prosecution argues that this Court's recent decision in *United States v. Cotton*, 535 U.S. 625 (2002) has somehow called into question more than a century of this Court's decisions. The Defense respectfully suggests the *Cotton* decision applies to this case only to the extent that it confirms that a citizen's Fifth Amendment grand jury right may be waived if not timely invoked prior to trial.

In *Cotton*, unlike here, the defendant failed to object to the sufficiency of the indictment prior to trial or even on the district court level. *Id.* at 628. While on appeal, the Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Based upon that decision, Cotton asked the appellate court to reverse his enhanced sentence because the drug amount used to impose that sentence was not alleged in the indictment. *Id.* at 629. The Fourth Circuit did so and the prosecution petitioned for a writ of *certiorari*. This Court reversed, holding that while the trial court may have erred, the standard of review was one of "plain error" because the defendant had not raised the issue prior to trial. This Court then determined that the defective indictment did not rise to the level of plain error.

Cotton is distinguishable from this case for two reasons: (1) the defendant attacked the validity of the indictment only on appeal; and (2) the alleged deficiency in the indictment was the failure to allege a sentencing factor.

First, this Court recognized that an accused can waive his grand jury right. *Id.* at 630, citing *Smith v. United*

States, 360 U.S. 1, 6 (1959). This Court went on to note that Cotton had, indeed, made such a waiver by failing to make a timely assertion of that right. *Id.* at 634, citing *Yakus v. United States*, 321 U.S. 414, 444 (1944). This Court pointed out this critical distinction between its ruling in *Cotton* and previous cases in which a harmless error approach regarding that validity of the indictment was rejected because the defendant had made a timely objection to the charge. *Id.* at 631.

Here, Omer, like the defendants in *Stirone* and *Russell*, made a proper, timely objection to the validity of the charge that was ultimately presented to the petit jury. He did not, like Cotton, waive his fundamental right to have his fellow citizens review the prosecutorial function by failing to object to the sufficiency of the indictment prior to trial.

Second, this Court noted that the alleged defect in Cotton's indictment pertained to a sentencing enhancement factor. *Id.* at 633. Even if Cotton had attacked the indictment prior to trial, he would not have prevailed. The indictment did, in fact, allege a federal offense. The indictment was deficient only in that it failed to allege the drug amounts for which Cotton was ultimately held accountable at sentencing. The indictment's mere failure to allege a specific amount of controlled substance did not, in and of itself, mean that the grand jury had failed to charge an indictable offense.

The Petitioner also suggests that this Court's decision regarding harmless error in *Neder v. United States, supra*, impacts this case. It does not. In *Neder*, the trial court had instructed the jury that it need not decide whether Neder's false statements were material. *Id.* at 6. This Court held

that, while the jury instruction was error, it was not structural error and was, therefore, subject to a harmless error review. Upon reviewing the trial transcript this Court determined the error was harmless because the prosecution had produced ample evidence at trial that Neder's conduct was material to the fraud and upheld the conviction. *Id.* at 16

This Court's ruling in *Neder*, that a district court's refusal to instruct a petit jury on an element of an offense is not a structural error, is inapplicable to a trial court's denial of a motion to dismiss a grand jury indictment which does not recite an essential element of the offense. As explained herein, this Court and every federal appellate court that has addressed this issue have so held.

Finally, the Prosecution relies on this Court's ruling in *United States v. Mechanik*, 474 U.S. 66, (1986) to suggest that an irregularity in grand jury proceedings can be subject to a harmless error analysis. In *Mechanik*, this Court upheld a conviction even though the defense complained that two witnesses were in the grand jury room at the same time. *Id.* at 73. The Defense respectfully points out, however, that prior to this Court's decision in *Mechanik* this Court found two grand jury errors to be structural – racial discrimination in the selection of grand jurors, *Vasquez v. Hillery*, 474 U.S. 254, 260-64 (1986), and sex discrimination in the selection of grand jurors, *Ballard v. United States*, 329 U.S. 187, 195-96 (1946).

As discussed herein, the United States Constitution not only protects citizens against racial and sex discrimination, but also criminal accusations based on facts not presented to a grand jury. That document does not, however, guaranty how many witnesses may be in the grand

jury room at one time. It is also important to note that in *Mechanik*, as was the case in every other opinion relied upon by the Prosecution, the defendant did not complain of the irregularity until the matter was on appeal. *Id.* at 70-71.

B. THE DECISION OF THE COURT OF APPEALS IS IN ACCORD WITH ALL OTHER DECISIONS OF THAT COURT.

The decision of the Court of Appeals in this case is consistent with all other decisions of that Court. In *Du Bo*, the Court's landmark case on this issue, the Court held that "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment. *Id.* at 1180. The Court of Appeals went on to hold that unlike the instance in which a trial jury has failed to make a finding with respect to an element of the offense, the grand jury's failure to do so is reversible error and cannot be cured by a finding of an appellate court that said the error was harmless. *Id.* In doing so, the Court of Appeals rejected the argument proffered here by the Prosecution that the Supreme Court's application of the harmless error analysis to a faulty petit jury instruction should be extended to a trial court's refusal to dismiss a defective indictment. After *Du Bo*, the Court of Appeals, in *United States v. Pernillo-Fuentes*, 252 F.3d 1030, 1032 (9th Cir. 2001) and *Summerland v. Stewart*, 341 F.3d 1082 (9th Cir. 2003) recognized and affirmed that a constitutionally deficient indictment is a structural defect requiring the reversal because the

indictment fails to insure that the Defendant was prosecuted only on the basis of facts presented to the grand jury.

Prior to *Du Bo*, as early as 1979 the Court of Appeals reversed a homicide conviction finding that the failure of an indictment to detail each element of the charged offense constitutes a fatal defect. *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *see also, United States v. King*, 587 F.2d 956, 963 (9th Cir. 1978); *United States v. Morrison*, 536 F.2d 286, 288 (9th Cir. 1976). In *Keith* the Court of Appeals recognized the failure of the indictment to charge essential elements could not be cured by trial court amendment or through jury instructions. The court wrote that the very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. In doing so, the Court cited this Court when it wrote in *Russell* that "to allow a prosecutor or court to subsequently guess as to what was in the minds of the grand jury at the time that they returned the indictment would deprive the defendant of a basic protection that the Grand Jury was designed to secure." *Russell*, 369 U.S. at 770.

The Petitioner has failed to grasp the reasoning of the Court of Appeals in *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999) and its prior case law. In *Du Bo*, the court recognized that usually grand jury proceedings are secret and the evidence presented to a grand jury is not available for review by a district or appellate court. Accordingly, if the grand jury does not make a finding as to an essential element of an offense, a reviewing court, unless the grand jury transcripts were disclosed, would need to guess as to what the grand jury was thinking. The Court of Appeals iterated this Court's reasoning in *Russell* that it would be

inappropriate to allow an appellate court to guess as to what was in the minds of the grand jury at the time they returned the indictment. *Id.* at 1180. Accordingly, a trial court's denial of a valid pre-trial motion based on the failure to allege an element of the offense is reversible error. *Id.*

In short, the decision of the Court of Appeals is in accord with that circuit's prior decisions.

C. THE DECISION OF THE COURT OF APPEALS IS IN COMPLETE ACCORD WITH OTHER CIRCUIT COURT OPINIONS.

Nine of the eleven other circuits have addressed whether a denial of a timely motion to dismiss a defective indictment is reversible error when grand jury transcripts are not available. Some of those decisions are in the context of indictments that were defective when brought and some are in the context of indictments that became defective when the trial court amended the indictment from a charge other than that found by the grand jury. All nine circuits have unanimously concurred with the decision below, although some circuits have gone beyond the ruling of the Court of Appeals by holding that a defective indictment is reversible error no matter when the objection is raised.

The cases are as follows:

In *United States v. Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004) the D.C. Circuit reversed and dismissed an indictment when the trial court erroneously denied a pre-trial motion to dismiss the indictment that omitted an element of the offense.

In *United States v. Van Tran*, 234 F.3d 798, 809 (2d Cir. 2000) the Second Circuit reversed a conviction where the defendants were charged and pled guilty to a simple firearms offense, but were sentenced as if they possessed a sawed-off shotgun even though they did not raise the issue until appeal. The court stated:

> In sum, unless the right to be charged by an indictment containing all of the material elements of an offense is voluntarily, intelligently, and knowingly waived by the defendant, the indictment as returned limits the scope of the district court's jurisdiction to the offense charged in the indictment. If the district court acts beyond its jurisdiction by trying, accepting a guilty plea from, convicting, or sentencing a defendant for an offense not charged in the indictment, this Court must notice such error . . .

Id.

In *United States v. Spinner*, 180 F.3d 514, 516 (3d Cir. 1999) the Third Circuit reversed a conviction even though the sufficiency of the indictment was not challenged until after guilty plea on appeal. The Court wrote: "Happily, the rule that the indictment, to be sufficient, must contain all the elements of a crime . . . is still a vital part of our Federal criminal jurisprudence." *Id.*

In *United States v. Hooker*, 841 F.2d 1225, 1230 (4th Cir. 1998) the Fourth Circuit recognized the Fifth Amendment requires that a defendant be convicted only on charges considered and filed by the Grand Jury. In *United States v. Spruill*, 118 F.3d 221 (4th Cir. 1997) the prosecution alleged the defendant had made threats but failed to allege an essential element of the offense – that the threats concerned fire or explosives. The court reversed the

conviction although the defendant had not raised the issue pre-trial, holding that omission of an essential element of the offense is not subject to a harmless error analysis whenever the issue is raised. *Id.* at 227. Also, in *United States v. Pupo*, 831 F.2d 1245 (4th Cir. 1988), the court held that when an indictment fails to include an essential element of the offense charged, it thereby fails to charge any federal offense and a conviction under the indictment may not stand, provided the omission is timely raised. *Id.* at 1239.

In *United States v. Nunez*, 180 F.3d 227, 230-31 (5th Cir. 1999), the prosecution charged the defendant with resisting arrest by assaulting a federal officer with a firearm. At trial, the prosecution proved only an alternative method of the assault. The Fifth Circuit reversed holding that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him, citing *Stirone v. United States*, 361 U.S. 212, 215-16 (1960).

In *United States v. Ford*, 872 F.2d 1231 (6th Cir. 1989), the prosecution charged a firearms infraction on a specific date, but successfully convinced the court to instruct the jury that it could convict if the prosecution proved the possession on any date. The Sixth Circuit recognized the trial court only had jurisdiction to try the defendant on the offense charged by the grand jury and reversed stating "the defendant may have been convicted of an offense other than that charged in the indictment." *Id.* at 1235.

In *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991) the prosecution charged the defendant with knowingly carrying and using a Mossberg rifle. At trial the

prosecution presented evidence regarding three rifles. The Seventh Circuit instructed the jury that it could convict if it found that the defendant had used and carried any of the three guns. Recognizing that a court cannot permit a defendant to be tried on charges that are not contained in the indictment against him, the circuit court reversed. *Id.* at 377. In *United States v. Yeo*, 739 F.2d 385, 386-87 (8th Cir. 1984), the Eighth Circuit reversed a conviction after the trial court amended the indictment to include persons other than that named in the indictment. The court, in a later case, recognized that a constructive amendment, which is reversible error *per se*, occurs when the essential elements of the offense set forth in the indictment are altered, either actually or in effect, by the prosecutor or the court after the grand jury has passed upon them. *United States v. Emery*, 186 F.3d 921, 927 (8th Cir. 1999).

In *United States v. Keller*, 916 F.2d 628, 634, 636 (11th Cir. 1990), the Eleventh Circuit held that a trial court's jury instructions constituted a constructive amendment of the indictment and therefore violated Keller's Fifth Amendment right to be charged by grand jury indictment, holding that such a violation is reversible error *per se*.

In summary, all federal courts that have addressed this issue have ruled that a judge's denial of a timely motion to dismiss a defective indictment when a transcript of the grand jury proceedings is not available for review is structural and the court's error is subject to automatic reversal. Additionally, all federal courts have agreed that a judge's amendment of an indictment in the same context creates a *scenario* in which a defendant is tried on a charge not brought by a grand jury. Such an amendment is also grounds for automatic reversal.

In support of its position that the decision below conflicts with decisions of other circuits, the Prosecution erroneously relies, either in its petition in this case or in its petition in *Resendiz-Ponce*, on a series of cases from six circuits which denied an attack on the indictment after reviewing for harmless error. All but one of those cases address the validity of an indictment that has been challenged for the first time after conviction or on appeal. Many of the cases alleged sentencing factor error under *Apprendi v. New Jersey*, 530 U.S. 466, 475 (2000) or *Ring v. Arizona*, 536 U.S. 584, 609 (2002), or both. The decision below conflicts with none of those decisions.

In *United States v. Corporan-Cuevas*, 244 F.3d 199, 203 (1st Cir. 2001) the defendant challenged the indictment for the first time on appeal after entering a plea of guilty. During his guilty plea he admitted the omitted element of the offense. The First Circuit Court upheld the conviction. *Id.* 203. In *United States v. Mojica-Baez*, 229 F.3d 292 (1st Cir. 2000), that court again upheld the conviction when the defendant challenged the indictment's failure to allege an element of the offense for the first time at sentencing and the attack was based upon a sufficiency of the evidence argument. *Id.* at 308.

In *United States v. Higgs*, 353 F.3d 281 (4th Cir. 2003) the defendant made a *Ring* challenge to the indictment for first time on appeal. The Fourth Circuit held that petit jury's finding of all the aggravating factors beyond a reasonable doubt demonstrated that Higgs was not prejudiced by the lack of an independent judgment of the grand jury. *Id.* at 306.

In *United States v. Robinson*, 367 F.3d 278, 289 (5th Cir. 2004) the Fifth Circuit also upheld a conviction when

the defendant made a *Ring* challenge to the indictment for the first time on appeal for failure to charge aggravating factors.

In *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002), the Sixth Circuit upheld a conviction when the defendant challenged the indictment's omission of an element of the offense for the first time on appeal.

In *United States v. Trennell*, 290 F.3d 881, 885 (7th Cir. 2002), the Seventh Circuit also denied a late *Ring* challenge to the indictment. Trenell's counsel not only failed to object to the deficiency in the indictment prior to trial, but did not object to proceeding to trial without a change in the indictment. Trennell did not object to the inclusion of the specific drug amounts on the proposed verdict form or jury instructions. *Id.* Only after trial did the defense file a motion challenging the verdict form which allowed the jury to find Trenell responsible for a specific quantity of cocaine. *Id.*

In *United States v. Prentiss*, 256 F.3d 971, 982-83 (10th Cir. 2001), the Tenth Circuit noted that the defendant failed to object to the sufficiency of the indictment or even request a bill of particulars at the district court level. The court upheld the conviction, but specifically cited *Du Bo*, noting that the facts in *Prentiss* were critically different because Du Bo had made a pre-trial challenge of the indictment. *Id.* at 993.

The one case upon which the Prosecution relies in which the defendant challenged the indictment prior to trial is *United States v. Allen*, 406 F.3d 940 (8th Cir. 2005). *Allen*, unlike here, involved a *Ring* challenge for failure to include an aggravating factor in a death sentence case.

The Court of Appeals, 247 F.3d 741, affirmed the conviction. Granting *certiorari*, this Court, 536 U.S. 953, vacated and remanded for reconsideration. On reconsideration, the Court of Appeals, 357 F.3d 745, vacated the death sentence and remanded for re-sentencing. The prosecution petitioned for rehearing *en banc*.

On rehearing the Eighth Circuit ruled the trial court's denial of the defendant's motion to dismiss was harmless because both the district court and the appellate court had the rare opportunity to review the grand jury transcripts in making that determination. *Allen*, 406 U.S. at 947-48. Upon reviewing those transcripts, the Appellate Court determined that any rational grand juror would have found the existence of the requisite aggravating factors. *Id.* at 948.

The *Allen* decision, then, has no application to and is in complete accord with the decision of the Court of Appeals in this case for two reasons. First, in *Allen* the District Court and Court of Appeals were able to inspect the grand jury transcript in order to insure that the defendant was tried on the basis of facts presented to the grand jury. This alleviated the constitutional infirmity noted by the Court of Appeals in *Du Bo* and this Court in *Russell, supra*, where the grand jury transcripts were not part of the record and the court, therefore, was not able to review them to insure that the defendant was "tried on the basis of facts presented to the grand jury." *Du Bo*, 186 F.3d at 1180; *Russell*, 369 U.S. at 753. Accordingly, in *Allen* the reviewing court was not impermissibly placed in the position of guessing what evidence was presented to the grand jury. *Id.* Instead, it was able to review the grand jury transcripts to determine whether the district court erred when it denied the defendant's motion to dismiss.

Second, unlike here, *Allen* involved a *Ring* challenge to the omission of a sentencing factor. As was the case in *Cotton*, even if Allen had attacked the indictment prior to trial, he would not have prevailed. The indictment did, in fact, allege a federal offense. The indictment was deficient only in that it failed to allege the aggravating factor for which Allen was ultimately held accountable at sentencing. The mere fact that the indictment did not allege those factors did not, in and of itself, deprive a federal court of jurisdiction over the case.

As noted above, in *Chapman* this Court determined that a district court's error is "harmless" only if the prosecution can prove to an appellate court's satisfaction, beyond any reasonable doubt, that the district court's erroneous ruling did not contribute to the defendant's conviction. 386 U.S. at 24. Here, the Court of Appeals has made an unchallenged determination that the District Court erred. If the District Court had not erred, it would have granted the Defense's motion to dismiss. If the motion had been granted, there would have been no trial. Had there been no trial, Omer would not have been convicted. This means the District Court's error contributed to Omer's conviction. Accordingly the District Court's error was not and could not be harmless.

In *Du Bo*, when the Court of Appeals wrote that such an error "cannot be cured by finding of an appellate court that said the error was harmless," 186 F.3d at 1180, the Court was not expressing an arbitrary restriction on an appellate court, it was stating a logical conclusion to a syllogism: If A is harmless only when it does not contribute to B; and A always contributes to B; then A is never harmless.

Accordingly, the Prosecution's petition, like the indictment it brought against Omer, is fatally defective.

REASONS TO DENY THE PROSECUTION'S REQUEST TO STAY THESE PROCEEDINGS IF THIS COURT GRANTS THE PROSECUTION'S PETITION

Petitioner further asks this Court to hold its petition here in abeyance pending disposition of *United States v. Resendiz-Ponce,* No. 05-998. Petitioner argues that the Question Presented here is broader than that presented in a petition already filed in *Resendiz-Ponce.* Petitioner's premise is flawed.

The issue here concerns a timely motion to dismiss a flawed indictment and a trial that perpetuated that flaw, because evidence of the missing element was *never* supplied. The issue is not broader; instead, the circumstances that obtain in this case are significantly worse for Petitioner's argument that the error in failing to dismiss a flawed indictment is subject to harmless error analysis. Indeed, as argued above, the unanimity of opinion with regard to the nature of the error here indicates that this Petition should be denied, regardless of the Court's decision in *Resendiz-Ponce.*

Further, the Court should not countenance Petitioner's case-shopping. While acknowledging the solemnity of Petitioner's duties, gamesmanship does not serve the interests of justice for any party. The panel below issued its decision in this case on January 12, 2005. Petitioner delayed the decision of the Court of Appeals on its petition for rehearing *en banc* by requesting two extensions for

time to file. Petitioner further delayed by requesting and obtaining two stays of mandate from the Court of Appeals under the guise of needing additional time for preparation and approval of this petition. In the meantime, Petitioner was able to complete a petition in *Resendiz-Ponce* to ensure its priority. If this Court determines that the lower Court's decision in that case warrants review, that should not also include sanction of Petitioner's effort to effect retroactive application of any decision from that case.

CONCLUSION

Omer respectfully requests this Court to deny the petition because the decision of the Court of Appeals comports with precedent set by this Court and is entirely consistent with all circuit court decisions.

If this Court grants the petition, for the reasons set forth above Omer respectfully asks this Court to refrain from placing this case in abeyance pending the outcome of another case and respectfully asks this Court, instead, to consolidate the cases.

Respectfully submitted,

MICHAEL J. SHERWOOD
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APPENDIX "A"

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ATTORNEY FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, **Plaintiff-Appellee/ Cross-Appellant,** **vs.** **TIMOTHY OMER,** **Defendant-Appellee Cross-Appellee.**	**CA 03-30544** **CA 03-30513** **District Court Number: CR 03-09-M-DWM** **MOTION FOR EXTENSION OF TIME**

Comes now the United States of America by and through Kris A. McLean, Assistant United States Attorney for the District of Montana and pursuant to Circuit Rule 31-2.2(b) respectfully requests this Court grant an extension of time of 45 days in which to file its Petition for Rehearing or for Rehearing En Banc in the above captioned matter. The government's petition for re-hearing is

currently due on February 2, 2005. Government counsel is making this request on the grounds and for the reason that the United States Department of Justice requires additional time to analyze the issues and make its recommendation to the Solicitor General of the United States concerning the government's rehearing request in this case. Government counsel has exercised due diligence and advises the court that the government's petition for rehearing will be filed within the time requested.

The defendant-appellant is not in custody at this time.

Government counsel has contacted appellant's counsel who advises that he has no objection to this continuance.

WHEREFORE the United States respectfully requests an extension of 45 days in which to file its Petition for Rehearing or for Rehearing En Banc.

DATED this 24th day of January, 2005.

WILLIAM W. MERCER
United States Attorney

/s/ Kris A. McLean
KRIS A. MCLEAN
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee in the Office of the United States Attorney and is a person of such age and discretion as to be competent to serve papers.

That on 1-24-05 she served a copy of the attached **MOTION FOR EXTENSION OF TIME** by placing said copy in a postpaid envelope addressed to the person(s)

hereinafter named, at the place(s) and address(es) stated below, which is/are the last known address(es), and by depositing said envelope and contents in the United States Mail at Missoula, Montana.

Addressee(s):
Michael J. Sherwood
Attorney at Law
P.O. Box 8358
Missoula, MT 59807

/s/ Sheryl L. Nordahl
Sheryl L. Nordahl
Paralegal Specialist

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee/ Cross-Appellant, v. TIMOTHY W. OMER, Defendant-Appellee.	)	Nos. 03-30513 & 03-30544

GOVERNMENT'S MOTION FOR FURTHER EXTENSION OF TIME TO SEEK REHEARING EN BANC

Pursuant to Rules 26 and 27 of the Federal Rules of Appellate Procedure, the United States respectfully requests that the Court extend the period of time in which the government may file a petition for rehearing en banc in this case by 7 days, from March 11, 2005 to March 18, 2005. In support, the government states the following:

1. On January 19, 2005, this Court issued a published per curiam opinion reversing defendant Omer's conviction for bank fraud, holding that the indictment's failure to include an explicit allegation that the scheme to defraud was "material" constituted a "fatal flaw requiring dismissal of the indictment." 395 F.3d 1087, 1089.

On February 1, 2005, this Court granted the government's motion extending the time for filing a petition for rehearing en banc to March 11, 2005.

2. The government may not file a petition for rehearing en banc without the authorization of the Solicitor General (SG). Due to the general press of a wide range of matters, including, most notably, issues involving the implementation of *United States v. Booker*, 125 S. Ct. 738 (2005), the SG's Office has not yet made a final determination as to the propriety of seeking rehearing en banc in this case. In fact, the Deputy Solicitor General who oversees criminal-law matters is himself presenting an oral argument before the en banc Eighth Circuit in *United States v. Pirani*, No. 03-2871, a Booker-related matter scheduled for argument on March 9, 2005. We believe that a brief further extension of 7 days should be sufficient to allow for a more complete and informed decision, and, if authorized, for the preparation of the petition.

3. This motion is made in good faith (after consultation with counsel's supervisors) and not for purposes of delay.

4. Defendant is not in custody, and therefore, is not likely to be prejudiced by this request.

5. Counsel for the defendant was contacted concerning this request but no response had been received by the time this motion was filed.

WHEREFORE, the United States respectfully requests that the Court extend the time in which the government may seek rehearing en banc to March 18, 2005.

Dated: March 7, 2005

Respectfully submitted,

WILLIAM W MERCER
United States Attorney
District of Montana

KRIS A. McLEAN
Assistant United States Attorney
District of Montana

By: /s/ Michael A. Rotker
MICHAEL A. ROTKER
Attorney
United States Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Avenue, NW
Room 1264
Washington, D.C. 20530
Tel: (202) 514-3308

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 7th day of March 2005, I caused to be served the foregoing Government's Motion for Further Extension of Time To File Petition for Rehearing En Banc by causing a true and correct copy thereof to be deposited in the U.S. mail, postage prepaid, and addressed as follows:

Michael J. Sherwood, Esq.
Attorney at Law
P.O. Box 8358
Missoula, MT 69807
Counsel for Defendant-Appellee

/s/ Michael A. Rotker
MICHAEL A. ROTKER
Attorney for the United States

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. TIMOTHY W. OMER, Defendant-Appellant	)	No. 03-30513

UNITED STATES OF AMERICA Appellant v. TIMOTHY W. OMER, Defendant-Appellee.	)	No. 03-30544

MOTION TO STAY THE MANDATE

Pursuant to Fed. R. App. P. 41(d)(2) and 9th Cir. R. 41-1, the United States of America respectfully requests that the Court stay the mandate for 90 days so that the Solicitor General may decide whether to file a petition for a writ of certiorari in this case. As set forth below, a certiorari petition "would present a substantial question and * * * there is good cause for a stay." Fed. R. App. P. 41(d)(2).

STATEMENT

1. This is a defense appeal from a judgment of conviction and sentence in a criminal case. In June 2001, Omer and co-defendant Regan Tabor embarked on a check kiting scheme by depositing "not sufficient funds" (NSF)

checks into various bank accounts and drawing further checks against the artificially inflated balances. To conceal their actions, they took advantage of a check float – i.e., a short period of time that passes before a deposited check is processed and presented for payment from the account on which the check is drawn – and fraudulently obtained large sums of cash from four different financial institutions even though the accounts contained insufficient funds.

A federal grand jury in the District of Montana returned a five-count indictment against Omer and Tabor. Count 1, the only count against Omer, charged him and Tabor with "knowingly execut[ing] or attempt[ing] to execute a scheme or artifice to defraud" four specific "financial institutions" between June 25, 2001 and October 5, 2001, by kiting checks between six bank accounts, all in violation of 18 U.S.C. 1344(1). Indictment, Count 1.[1]

2. Defendant filed a pretrial motion to dismiss the indictment, arguing that "[t]he Fifth Amendment requires that a defendant be convicted only on charges considered and found by a Grand Jury." Mot. to Dismiss (6/1/03) 12. Citing *Neder* v. *United States*, 527 U.S. 1 (1999), he argued that the indictment was deficient because it failed to allege, explicitly, that the scheme was "material" to defrauding the banks, and that the financial institutions

[1] The federal bank fraud statute makes it a crime to "knowingly execute[ ], or attempt[ ] to execute, a scheme or artifice * * * to defraud a financial institution." 18 U.S.C. 1344(1). Subsection (2) of that statute makes it a crime to obtain money or assets from a financial institution "by means of false or fraudulent pretenses, representations, or promises." Subsection (2) was not charged in this case, and thus is not at issue. Cf. *United States* v. *McNeil*, 320 F.3d 1034, 1037 (9th Cir. 2003) ("The scope of [Section 1344(1) and Section 1344(2)] differs substantially.").

were federally insured. The district court denied the motion, and the case went to trial. At the close of the government's case, defendant moved for a judgment of acquittal, arguing that the government failed to present any evidence that he made a false or misleading statement, much less a material one. The district court denied the motion, as well as defendant's request for a jury instruction requiring the jury to find that he had made a materially false statement. Instead, the district court instructed the jury that, to find defendant guilty of bank fraud, the jury must find, inter alia, that he "knowingly executed a scheme or artifice to defraud the financial institutions [listed in Count 1]"; that he "did so with the intent to defraud"; and that the financial institutions were federally insured or otherwise chartered by the United States. Jury Instr. No. 22. The court further instructed that "[t]he phrase 'any scheme or artifice to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive or cheat another or by which someone intends to deprive another of something of value." Jury Instr. No. 25. The jury convicted defendant on Count 1. The district court sentenced defendant to five months in prison, but stayed execution of the sentence pending appeal.

3. This Court reversed defendant's conviction, agreeing with him that the indictment was fatally deficient because it failed to explicitly allege the materiality of the scheme. *United States* v. *Omer*, 395 F.3d 1087 (9th Cir. 2005) (per curiam). The panel noted that in *Neder, supra*, the Supreme Court held that the term "defraud" used in Section 1344(1) (as well as the analogous mail- and wire-fraud statutes) evidenced Congress's intent to retain that term's well-accepted meaning, which, at common law,

included a "materiality" component. *Id.* at 1088-1089. The panel also explained that it is the scheme or artifice itself, rather than any specific statement or omission, that must be material. *Id.* at 1089. Applying these principles, the panel concluded that defendant's indictment was deficient because it did not "recite" that the scheme or artifice alleged was "material." *Id.*

With respect to the remedy, the panel, following *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), held this omission was not amenable to harmless-error analysis, but instead was governed by the *Du Bo* rule that, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is * * * a fatal flaw requiring dismissal of the indictment" 395 F.3d at 1088 (quoting *Du Bo*); *id.* at 1089 (reversing conviction pursuant to this rule).

4. The Solicitor General authorized the government to seek rehearing en banc of that portion of the panel decision holding (in accordance with *Du Bo*) that indictment omissions were not amenable to harmless-error analysis. On October 31, 2005, this Court denied the government's petition, over the published dissent of six judges. See *United States* v. *Omer*, ___ F.3d ___, 2005 WL 2842078 (9th Cir. Oct. 31, 2005) (Graber, J., dissenting, joined by Kozinski, O'Scannlain, Bybee, Callahan, and Bea, JJ.).

ARGUMENT

A party may "move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court," and such a stay should be granted if "the certiorari petition would present a substantial question and that

there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). The stay "must not exceed 90 days," unless, inter alia, the party seeking the stay files a certiorari petition and notifies the clerk within the period of the stay, in which case the stay "continues until the Supreme Court's final disposition." Fed. R. App. P. 41(d)(2)(B). Consistent with these principles, this Court should stay the issuance of its mandate in this case for 90 days to afford the Solicitor General an adequate opportunity to consider whether to seek Supreme Court review of the decision in this case.

1. A certiorari petition is due for filing in the United States Supreme Court without an extension within 90 days of the order denying rehearing (in this case, Monday, January 30, 2006). See 28 U.S.C. 2101(c); S. Ct. R. 13.1.

2. As the dissent from the order denying rehearing en banc makes clear, this case presents a substantial issue for possible Supreme Court review: whether the omission of an essential allegation from a criminal indictment is amenable to harmless-error review. This question is important, not only because of its recurring significance, but also because this Court's resolution of that question in *Du Bo* is (1) in serious tension with extant Supreme Court precedent, (2) rests on premises that are questionable at best, and (3) conflicts with the decisions of other courts of appeals applying harmless-error analysis to similar indictment defects.

3. The decision whether to seek certiorari rests with the Solicitor General. 28 C.F.R. 0.20(b). In this case, the Solicitor General has already authorized the filing of the government's petition for rehearing en banc. Accordingly, he will carefully consider whether to file a certiorari petition in the Supreme Court. Before he makes that

decision, however, he must receive written recommendations from the United States Attorney, the Assistant Attorney General for the Criminal Division, an Assistant to the Solicitor General, and the Deputy Solicitor General for criminal matters. The process of preparing those memoranda has only just begun.

4. A stay of the mandate is needed to ensure that the Solicitor General has the time required to make a fully informed decision on whether to pursue Supreme Court review, and to prepare and file a petition, if he elects to file one. A stay of the mandate will also ensure that the case does not return to the district court where proceedings could resume before the Solicitor General makes a final determination.

5. The defendant will not be prejudiced by a stay of the mandate. The Solicitor General may seek review of the Court's decision in the Supreme Court whether or not the mandate issues. Staying the mandate merely operates to defer any further proceedings in the district court until Supreme Court review is completed; it does not affect either the time for filing a certiorari petition or the power of the Court to grant a petition if one is filed. *Clay* v. *United States*, 537 U.S. 522, 527 (2003); *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983). And, as noted, the district court stayed the execution of the defendant's sentence pending appeal, so, barring a violation of the conditions of his release, he will remain out of custody until this case is finally resolved.

6. In the event the Solicitor General decides not to seek Supreme Court review, the government will notify the Court and counsel immediately, and the mandate can issue forthwith.

7. Michael Sherwood, counsel for the defendant, has advised me that he opposes this request.

WHEREFORE, the Court should grant the government's Motion to Stay the Mandate for 90 Days.

Respectfully submitted,

WILLIAM W. MERCER
United States Attorney
District of Montana

KRIS A. McLEAN
Assistant United States Attorney
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By /s/ Michael A. Rotker
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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing motion has been sent this 1st day of November 2005, by first class mail, postage prepaid, to:

Michael J. Sherwood, Esq.
Attorney at Law
P.O. Box 8358
Missoula, MT 59807

/s/ Michael A. Rotker
MICHAEL A. ROTKER
Counsel of Record for the
United States

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. TIMOTHY W. OMER, Defendant-Appellant	)	No. 03-30513

UNITED STATES OF AMERICA Appellant v. TIMOTHY W. OMER, Defendant-Appellee	)	No. 03-30544

MOTION TO FURTHER EXTEND THE STAY OF THE MANDATE FOR GOOD CAUSE

Pursuant to Fed. R. App. P. 41(d)(2)(B) and 9th Cir. R. 41-1, the United States of America respectfully seeks a further extension of the mandate in this case "for good cause" shown.

STATEMENT

1. This case presents the question whether the omission of an essential allegation from a criminal indictment is automatically reversible without regard to possible prejudice. Following circuit precedent, the three judge panel in this case so held. See *United States* v. *Omer*, 395 F.3d 1087, 1088-1089 (9th Cir. 2005) (per curiam) (applying

the rule of *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), that, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is * * * a fatal flaw requiring dismissal of the indictment").

2. The Solicitor General authorized the government to seek rehearing en banc of that portion of the panel decision holding (in accordance with *Du Bo*) that indictment omissions are not amenable to harmless-error analysis. On October 31, 2005, this Court, over the published dissent of six judges, denied the government's petition. See *United States* v. *Omer*, ___ F.3d ___, 2005 WL 2842078 (9th Cir. Oct. 31, 2005) (Graber, J., dissenting, joined by Kozinski, O'Scannlain, Bybee, Callahan, and Bea, JJ.).

3. On November 1, 2005, the government sought a stay of the mandate for 90 days pending the Solicitor General's determination whether to seek certiorari review of the *Du Bo* automatic-reversal rule. On November 9, 2005, Judge Thomas granted the government's motion and stayed issuance of the mandate for 90 days (i.e., to February 7, 2006).

4. On January 24, 2006, the Solicitor General authorized the filing of a petition for a writ of certiorari in *United States* v. *Resendiz-Ponce*, 425 F.3d 729 (9th Cir. 2005), a case decided while the government's en banc petition in this case was still pending. Like the decision here, *Resendiz-Ponce* invoked the *Du Bo* rule and ordered the dismissal of an indictment due to its failure to allege an essential element of a crime. The petition in *Resendiz-Ponce* is currently due on February 8, 2006.

In light of his decision to authorize certiorari in *Resendiz-Ponce*, on January 24, 2006, the Solicitor General also authorized the filing a petition for a writ of certiorari in this case that asks the Supreme Court to hold this case pending its decision on the petition in *Resendiz-Ponce*. The petition in this case is currently due on February 28, 2006.

DISCUSSION

1. Fed. R. App. P. 41(d)(2)(B) presumptively limits the duration of a stay of the mandate to 90 days, a time limit that tracks the requirement that petitions for writs of certiorari be filed within 90 days of the entry of the judgment. See S. Ct. R. 13.1. But Rule 41 expressly permits a further extension of the stay *either* "for good cause" *or* "unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay," in which case "the stay continues until the Supreme Court's final disposition." Fed. R. App. P. 41(d)(2)(B).

There is presently "good cause" for a further extension of the November 9, 2005 stay. The Solicitor General has now authorized the filing of a certiorari petition in this case, but due to the press of other matters, has requested an extension of time in which to file that petition to and including February 28, 2006 -- 21 days after the stay would expire. The stay previously entered in this case should therefore be extended to prevent the mandate from issuing during the window of time after the stay would otherwise expire but before the certiorari petition is filed (i.e., between February 7th and 28th). And, upon the filing of that petition, the government will promptly notify the clerk of this Court in writing of that filing, which, by rule,

will automatically extend the stay pending the Supreme Court's final disposition.

2. Michael Sherwood, counsel for the defendant, opposed our original request for a stay of the mandate, and we therefore have assumed that he will oppose this request as well.

WHEREFORE, the Court should grant the government's Motion to Further Extend the Stay of the Mandate for Good Cause pending the filing of a certiorari petition.

Respectfully submitted,

WILLIAM W. MERCER
United States Attorney
District of Montana

KRIS A. McLEAN
Assistant United States Attorney
District of Montana

By /s/ Michael A. Rotker
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CERTIFICATE OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a copy of the foregoing motion has been sent this 25th day of January 2006 by first class mail, postage prepaid, to:

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/s/ Michael A. Rotker
MICHAEL A. ROTKER
Counsel of Record for the
United States

No. 05-1101

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY W. OMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Solicitor General
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Department of Justice
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(202) 514-2217

In the Supreme Court of the United States

No. 05-1101

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY W. OMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

The United States files this supplemental brief in order to address the implications of the Court's decision in *United States* v. *Resendiz-Ponce*, No. 05-998 (Jan. 9, 2007), on the petition for a writ of certiorari in this case. The petition asked the Court to hold this case pending resolution of the original question presented in *Resendiz-Ponce*: *i.e.*, whether, in a federal prosecution, the omission of an element of the offense from the indictment can constitute harmless error. After supplemental briefing in *Resendiz-Ponce*, however, the Court did not reach that question, but instead held that the Ninth Circuit erred by holding that the indictment in that case was constitutionally deficient at all. The respondent in *Resendiz-Ponce* had been charged with attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a); under that statute, a defendant must commit an overt act that qualifies as a

substantial step toward completion of his goal. Slip op. 5. The Court agreed with the government that the indictment "implicitly alleged that respondent engaged in the necessary overt act simply by alleging that he 'attempted to enter the United States.'" *Ibid.* (internal quotation marks omitted).

In this case, the Ninth Circuit noted that "[respondent's] indictment fails to recite an essential element of the charged offense—materiality of falsehood," and then held that, because respondent's indictment omitted an element of the offense and because respondent properly challenged the sufficiency of the indictment before trial, the indictment should have been dismissed (and respondent was therefore entitled to automatic reversal). Pet. App. 2a. In the wake of the Court's decision in *Resendiz-Ponce*, however, it appears that the indictment in this case was not constitutionally deficient. As the Court has noted, it is well settled that the term "fraud" requires a misrepresentation or concealment of material fact, see, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 22 (1999)—just as the term "attempt," "as used in the law for centuries," encompasses an overt-act requirement, see *Resendiz-Ponce*, slip op. 5. The indictment in this case therefore need not have separately alleged that the scheme at issue (or any statement made in the course of the scheme) was materially false or deceptive.

As in *Resendiz-Ponce*, if the indictment in this case was not constitutionally deficient, the case would not present any question concerning whether a constitutional defect in the indictment could be harmless. Rather than granting plenary review in this case, therefore, the Court should vacate and remand in order to allow the court of appeals to decide, in the first instance,

whether the indictment was constitutionally deficient.* In the event that the court of appeals were to adhere to its holding that the indictment was constitutionally deficient, the government could file, and the Court could consider, a renewed petition for certiorari at that juncture.

* * * * *

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *United States* v. *Resendiz-Ponce*, No. 05-998 (Jan. 9, 2007).

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JANUARY 2007

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* Petitioner also argued below that the indictment was deficient because it failed to allege that the defrauded banks were federally insured. The district court held, however, that the indictment implicitly alleged that element through its use of the phrase "financial institution," C.A. Supp. E.R., Tab C, at 5, and the court of appeals did not address that issue.

(5)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* TIMOTHY W. OMER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05–1101. Decided January 16, 2007

The petition for a writ of certiorari is denied.

Statement of JUSTICE SCALIA respecting the denial of the petition for writ of certiorari.

My dissent in *United States* v. *Resendiz-Ponce*, 549 U. S. ___ (2007), warned that the Court's opinion was "effecting a revolution in our jurisprudence regarding the requirements of an indictment," *id.*, at ___ (slip op., at 4), and that it would provide a license for the Government to avoid explicating the elements of a criminal offense whenever it feels the "common parlance" of the crime's name evokes them, *id.*, at ___ (slip op., at 1–2). I had not realized how quickly that license would be exercised. Barely 24 hours after we released *Resendiz-Ponce*, the Solicitor General filed a supplemental brief in this case, which raises the question (avoided in *Resendiz-Ponce*) whether the omission of an element of the offense from a federal indictment can constitute harmless error. The supplemental brief urged us not to grant review in this case for the following reason:

> "In the wake of the Court's decision in *Resendiz-Ponce* . . . it appears that the indictment in this case was not constitutionally deficient. As the Court has noted, it is well settled that the term 'fraud' requires a misrepresentation or concealment of material fact . . . just as the term 'attempt,' 'as used in the law for centuries,' encompasses an overt-act requirement, see *Resendiz-Ponce*, slip op., at 5. The indictment [for fraud] in this case therefore need not have separately alleged that

> the scheme at issue (or any statement made in the course of the scheme) was materially false or deceptive." Supp. Brief for United States 2.

That is not the reason I concur in the Court's decision to deny certiorari. It may, however, be a good reason—depending upon how the crime of fraud fares in our new some-crimes-are-self-defining jurisprudence. Another frontier of law opened by this Court, full of opportunity and adventure for lawyers and judges.

Supreme Court, U.S.
FILED
APR 10 2006
OFFICE OF THE CLERK

(2)

No. 05-1101

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TIMOTHY W. OMER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 05-1101

UNITED STATES OF AMERICA, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

Unlike the respondent in *United States* v. *Resendiz-Ponce*, No. 05-998, respondent in this case contends that the question whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error does not warrant this Court's review. That contention lacks merit. As discussed in greater detail in the government's petitions in this case and in *Resendiz-Ponce*, the Ninth Circuit's rule that the omission of an offense element from a federal indictment necessitates automatic reversal conflicts with decisions from numerous other circuits and is inconsistent with this Court's decisions. For that reason, the petition in *Resendiz-Ponce* should be granted. Respondent offers no valid argument why the Court should grant plenary review in this case rather than (or in addition to) *Resendiz-Ponce*. Because this case is a less suitable

vehicle for resolution of the question on which the circuits are divided, but because the resolution of that question will have a bearing on the ultimate outcome of this case, the petition in this case should be held pending the disposition of *Resendiz-Ponce*.

1. Respondent first contends (Br. in Opp. 8-14) that the Ninth Circuit's rule is consistent with this Court's decisions. That contention is unsound.

a. Respondent primarily relies (Br. in Opp. 9-10) on this Court's decisions in *Stirone* v. *United States*, 361 U.S. 212 (1960), and *Russell* v. *United States*, 369 U.S. 749 (1962). In *Stirone*, the Court held that a defendant was deprived of his Fifth Amendment right to indictment by grand jury when the government proved an element at trial in a way that departed from the way the element was alleged in the indictment. The Court declined to treat the deviation from the indictment as harmless error. 361 U.S. at 217. In *Russell*, the Court held that a defendant was similarly deprived of his right to indictment by grand jury when the indictment alleged the elements of the underlying offense, but was insufficiently specific with regard to one of the elements. The Court again refused to subject the error to harmless-error analysis. 369 U.S. at 770. Both *Stirone* and *Russell*, however, were decided before the Court definitively held, in *Chapman* v. *California*, 386 U.S. 18 (1967), that constitutional errors could be subject to harmless-error analysis. Moreover, neither *Stirone* nor *Russell* involved the *omission* of an offense element from the indictment. *Stirone* and *Russell* are thus inapposite here.

b. Respondent next attempts to distinguish (Br. in Opp. 11-13) this Court's more recent decisions in *Neder* v. *United States*, 527 U.S. 1 (1999), and *United States* v. *Cotton*, 535 U.S. 625 (2002). As to *Neder*, re-

spondent suggests only that the Court's holding is "inapplicable to a trial court's denial of a motion to dismiss a grand jury indictment which does not recite an essential element of the offense." Br. in Opp. 13. Respondent, however, provides no explanation why the omission of an offense element from the *indictment* should be immunized from harmless-error analysis when the omission of an offense element from the *jury's instructions* is not. If anything, for the reasons stated in the petition in *Resendiz-Ponce* (at 11-13), the type of omission at issue here constitutes a far *weaker* candidate for automatic reversal than the type of omission in *Neder*.

As to *Cotton*, respondent correctly notes (Br. in Opp. 11) that "the defendant failed to object to the sufficiency of the indictment prior to trial or even on the district court level." That fact, however, simply explains why the claim at issue was subject to plain-error, rather than harmless-error, review. And respondent does not dispute that the Court's holding in *Cotton*—that the omission of a sentence-enhancing fact from the indictment did not constitute reversible plain error because it did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, see 535 U.S. at 632-633—at a minimum strongly suggests that any such error is not structural either, in that a structural error is one that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. *Cotton* thus reinforces the conclusion that the omission of an offense element from a federal indictment is amenable to harmless-error analysis.

c. Respondent further notes (Br. in Opp. 13) that, in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), and *Ballard* v. *United States*, 329 U.S. 187 (1946), this Court held that

discrimination in the selection of grand jurors constitutes structural error. This Court, however, has not embraced the broader proposition that a court can never conduct harmless-error review by asking whether a grand jury would have found a particular fact. To the contrary, in *United States* v. *Mechanik*, 475 U.S. 66 (1986), the Court held that errors in grand-jury proceedings can be assessed for harmlessness, *id.* at 70—and distinguished *Vasquez* on the ground that it rested on the view that "discrimination in the selection of the grand jury is so pernicious, and other remedies so impractical, that the remedy of automatic reversal was necessary." *Id.* at 71 n.1. And the Court further held that, in evaluating whether an error at the grand-jury stage is in fact harmless, a reviewing court is not limited to considering the transcripts of grand-jury proceedings (as respondent suggests, see, *e.g.*, Br. in Opp. 10-11, 22), but may appropriately consider the entire record, including the petit jury's subsequent verdict. 475 U.S. at 70.

2. Respondent next contends (Br. in Opp. 16-24) that the Ninth Circuit's rule does not conflict with the decisions of other circuits. That contention, too, is mistaken.

a. Respondent claims (Br. in Opp. 16) that "[n]ine of the eleven other circuits have addressed whether a denial of a timely motion to dismiss a defective indictment is reversible error when grand jury transcripts are not available" and that "[a]ll nine circuits have unanimously concurred with the decision below." Only the Third Circuit, however, has unambiguously held that the omission of an offense element from a federal indictment requires automatic reversal. See *United States* v. *Spinner*, 180 F.3d 514, 515-516 (1999). In decisions cited by respondent (Br. in Opp. 17), the Second and Fourth Circuits

seemingly reached the same result. See *United States* v. *Tran*, 234 F.3d 798, 809 (2d Cir. 2000); *United States* v. *Hooker*, 841 F.2d 1225, 1231-1232 (4th Cir. 1988). Those decisions, however, relied on the proposition that a defective indictment deprives the convicting court of jurisdiction to enter judgment—a proposition that this Court subsequently rejected in *Cotton*, see 535 U.S. at 629-631, and a proposition that both circuits have since (either explicitly or implicitly) rejected as well, see *United States* v. *Cordoba-Murgas*, 422 F.3d 65, 71 n.6 (2d Cir. 2005); *United States* v. *Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004). Of the remaining six circuits discussed by respondent, the D.C. Circuit merely reserved the question, see *United States* v. *Pickett*, 353 F.3d 62, 68 (2004), and the cited decisions from the other five circuits all involve the discrete question whether, as in *Stirone*, there has been a *constructive amendment* of the indictment requiring automatic reversal. See, *e.g.*, *United States* v. *Nunez*, 180 F.3d 227, 230-232 (5th Cir. 1999); *United States* v. *Leichtnam*, 948 F.2d 370, 374-381 (7th Cir. 1991); *United States* v. *Keller*, 916 F.2d 628, 632-636 (11th Cir. 1990), cert. denied, 499 U.S. 978 (1991); *United States* v. *Ford*, 872 F.2d 1231, 1234-1237 (6th Cir. 1989); *United States* v. *Yeo*, 739 F.2d 385, 386-387 (8th Cir. 1984). Apart from *Spinner*, therefore, none of the decisions cited by respondent validly implicates the question presented here.

b. Respondent suggests (Br. in Opp. 20-23) that, apart from *United States* v. *Allen*, 406 F.3d 940 (8th Cir. 2005), petition for cert. pending, No. 05-6764 (filed Sept. 29, 2005), all of the assertedly conflicting decisions of other circuits are distinguishable on the ground that they "address the validity of an indictment that has been

challenged for the first time after conviction or appeal" (Br. in Opp. 20). Were it true that those cases involved objections that had not been properly preserved before the trial court, those courts would have erred to the extent that they applied harmless-error, rather than plain-error, review. Contrary to respondent's assertions (*id.* at 20-21), however, in all but one of those cases, it is questionable whether the defendant *did* fail to preserve an objection below. In one case, the defendant actually filed a motion to dismiss the indictment. See *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 578 (6th Cir.), cert. denied, 537 U.S. 880 (2002). In another, the error was noted before trial began; although the defendant elected to proceed without a superseding indictment, he did file a post-verdict motion for a new trial, citing the indictment error. See *United States* v. *Trennell*, 290 F.3d 881, 884-885 (7th Cir.), cert. denied, 537 U.S. 1014 (2002). And in three others, the opinions of the courts of appeals are simply silent as to how the defendant preserved his objection. See *United States* v. *Robinson*, 367 F.3d 278 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *Higgs*, *supra*; *United States* v. *Corporan-Cuevas*, 244 F.3d 199 (1st Cir.), cert. denied, 534 U.S. 880 (2001). In the only case to the contrary, the defendant did not timely object in the district court, but the court of appeals ultimately concluded that that fact was irrelevant because harmless-error analysis was *always* applicable to the omission of an offense element from a federal indictment. See *United States* v. *Prentiss*, 256 F.3d 971, 983, 985 n.12 (10th Cir. 2001) (en banc). Because all of those decisions applied harmless-error analysis—and held that the omission of an offense element (or sentence-enhancing fact) does not constitute

structural error—they plainly conflict with the rule reaffirmed by the decision below.

3. Finally, respondent suggests (Br. in Opp. 24-25) that it would be inappropriate to hold this case pending the disposition of *Resendiz-Ponce* because the government engaged in "gamesmanship" by ensuring that the petition in this case was filed after the petition in *Resendiz-Ponce*. That allegation is entirely without merit. The panel in *Resendiz-Ponce* issued its decision on October 11, 2005, and the en banc court denied the petition for rehearing in this case on October 31, 2005 (20 days later). After the en banc court refused to grant rehearing on the question presented in this case, the government decided not to file what would surely have been a futile petition for rehearing en banc in *Resendiz-Ponce*, and instead filed a petition for certiorari in this Court on February 8, 2006—and filed its petition for certiorari in this case on February 28, 2006 (again, 20 days later).

More generally, respondent does not deny that *Resendiz-Ponce* constitutes a better vehicle for this Court's review, insofar as it presents the broader (and more frequently recurring) question whether the omission of an offense element from a federal indictment can be harmless, rather than the question whether the omission of an offense element *both* from the indictment *and* from the jury's instructions can be harmless. Nor does respondent dispute that the Court's answer to the former question will at least shed significant light on the correct answer to the latter. The appropriate disposition in this case is thus to hold the petition for *Resendiz-Ponce*.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be held pending this Court's disposition of *United States* v. *Resendiz-Ponce*, No. 05-998, and then disposed of accordingly.

Respectfully submitted.

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Solicitor General

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